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Evidence: 1998-1999 Survey of New York Law

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EVIDENCE

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CONTENTS

INTRODUCTION

This year's evidence *Survey* reports a number of significant New York Court of Appeals decisions concerned mostly with hearsay issues. These include authoritative decisions on the state of mind exception,[1] forfeiture of the hearsay objection by wrongdoing,[2] and prior witness statements of

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1. People v. James, 93 N.Y.2d 620, 717 N.E.2d 1052, 695 N.Y.S.2d 715 (1999).
2. People v. Johnson, 93 N.Y.2d 254, 711 N.E.2d 967, 689 N.Y.S.2d 689 (1999).

identification.[3] Lower state court decisions are included on a variety of topics when they reflect novel developments which do more than restate existing law. Examples are the important and recent appellate division opinion curtailing operation of the Rape Shield Statute[4] and the several trial court opinions on the appropriateness of expert testimony.[5] The *Survey* year also provided a half dozen valuable opinions of the United States Supreme Court[6] and the Second Circuit Court of Appeals.[7] As usual, the key developments involved mostly issues of hearsay, experts, witnesses, and privilege. These topics command most of our attention.

I. HEARSAY

A. State of Mind

It is well-established in New York and in every American jurisdiction that an extrajudicial declaration of present intention offered to show that the intended future act was done by declarant is admissible as an exception to the rule against hearsay.[8] This doctrine is known generally as the *Hillmon* exception because it derives from the celebrated United States Supreme Court decision in *Mutual Life Insurance Co. v. Hillmon*.[9] In this case, Hillmon's wife sued several insurance companies on three recently purchased policies covering her husband's life.[10] A body buried near Crooked Creek, Kansas was claimed by plaintiff to be that of Hillmon, the insured.[11] Defendants introduced evidence that the body was not that of Hillmon, but of one, Walters, who had disappeared at the same time.[12] At issue was the admissibility of two letters Walters wrote to his sister and

3. People v. Patterson, 93 N.Y.2d 80, 710 N.E.2d 665, 688 N.Y.S.2d 101 (1999); *see also* People v. Wilder, 93 N.Y.2d 352, 712 N.E.2d 652, 690 N.Y.S.2d 483 (1999).

4. People v. Jovanovic, 263 A.D.2d 182, 700 N.Y.S.2d 156 (1st Dep't 1999).

5. Wahl v. American Honda Motor Co., 181 Misc. 2d 396, 693 N.Y.S.2d 875 (Sup. Ct., Suffolk Co. 1999); People v. Phillips, 180 Misc. 2d 934, 692 N.Y.S.2d 915 (Sup. Ct., Queens Co. 1999).

6. Lilly v. Virginia, 527 U.S. 116 (1999); Weisgram v. Marley Co., 120 S. Ct. 1011 (2000); Portuondo v. Agard, 120 S. Ct. 1119 (2000).

7. Schering Corp. v. Pfizer, Inc., 189 F.3d 218 (2d Cir. 1999); Costantino v. Herzog, 203 F.3d 164 (2d Cir. 2000); Gonzalez v. Nat'l. Broad. Co., 194 F.3d 29 (2d Cir. 1999).

8. *See* MICHAEL M. MARTIN ET AL., NEW YORK EVIDENCE HANDBOOK § 8.3.3 (1997); FED. R. EVID. 803(3); Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 296 (1892).

9. *Hillmon*, 145 U.S. at 285. *Hillmon* has been described as the "most often and intensely examined case in all American evidence jurisprudence." *James*, 93 N.Y.2d at 628, 717 N.E.2d at 1055-56, 695 N.Y.S.2d at 718.

10. *Hillmon*, 145 U.S. at 285-86.

11. *Id.* at 287.

12. *Id.*

fiancee, in which he related his intention to accompany "a certain Mr. Hillmon" and "a man by the name of Hillmon" on a trip from Wichita.[13] In Walters' letter to his fiancee, he told her that Hillmon's purpose was "to start a sheep ranch, and, as he promised me more wager than I could make at anything else, I concluded to take it."[14] The defendant insurers sought to introduce the letters in support of their defense that Hillmon induced Walters to accompany him to some remote place where he would be killed in order to provide a corpse on which to base Mrs. Hillmon's fraudulent claim to the proceeds of the policies insuring her husband's life.[15] The letters were excluded as hearsay by the trial court.[16] The United States Supreme Court reversed a verdict for plaintiff.[17] It held that the letters were admissible under the state of mind exception to the hearsay rule as evidence that Walters had the intention of going away from Wichita with Hillmon which made it more probable that he in fact did go.[18]

It is clear then that the declaration of state of mind (intent) is admissible to prove the intended act of the declarant. But it is equally clear that the state of mind (memory) is not admissible to prove a past act. For if the state of mind exception were extended to include statements of memory to prove past acts, the hearsay rule would be destroyed. In other words, an out-of-court statement by declarant that "I intend to go to London next week" generally would be admissible to prove the trip. The statement "I went to London last week" generally would not.[19]

What if the statement of present intent is not offered solely to show the *declarant's* subsequent conduct? What if the declarant's statement of intent is offered to prove the subsequent conduct of another person? Can the *Hillmon* doctrine be extended, for example, to admit declarant's statement that "I intend to go to London with Joe" in order to prove that the non-declarant, Joe, went abroad? The difficulty here is that such a statement when used to prove the conduct of the non-declarant looks to the past as well as the future. It implies that sometime before the out-of-court statement, declarant and Joe made arrangements to go to London together. It is, therefore, an implied statement of memory that ordinarily would be

13. *Id.*
14. *Id.* at 288-89.
15. *Id.* at 294-95.
16. *Hillmon*, 145 U.S. at 294.
17. *Id.* at 300.
18. *Id.* at 296.
19. *See* Shepard v. U.S., 290 U.S. 96, 105-06 (1933); FED. R. EVID. 803(3) explicitly provides a hearsay exception for "declarant's then existing state of mind . . . (such as intent, plan, motive, design . . .) but not including a statement of memory or belief to prove the fact remembered or believed . . . ."; *see also* MARTIN ET AL., *supra* note 8, at § 8.3.3.

inadmissible hearsay.[20]

Until this *Survey* period, the New York Court of Appeals had not decided whether the state of mind exception could be stretched to cover the subsequent conduct of a non-declarant. The leading authority before now was the appellate division decision in *People v. Malizia*.[21] In this murder case, the victim's statement made shortly before the killing was a declaration that he was going to meet Malizia to pay him the proceeds of a drug deal.[22] The statement was admitted as evidence that the defendant did meet with the declarant victim.[23] Because it was alert to reliability concerns in this extension of the *Hillmon* doctrine, the Court imposed, as a condition of admissibility, that there be substantial independent evidence to show that the subsequent conduct actually occurred.[24]

The issue of whether the *Hillmon* exception can be used as evidence of the cooperative conduct of a non-declarant has now been authoritatively decided by the New York Court of Appeals. A clear affirmative answer was provided in *People v. James*.[25] The Court described the question as one of first impression and held that it was appropriate to admit "statements of a declarant's intention to perform acts entailing the participation jointly or cooperatively of a nondeclarant accused."[26]

People v. James involved a perjury conviction following a Grand Jury investigation of cheating on a police promotional examination.[27] James was a transit police officer who took and passed the examination.[28] During his Grand Jury testimony, he denied being present at a meeting where information pertaining to the exam was illegally revealed.[29] Evidence at the perjury trial established that Lieutenant Michael Gordon set up a meeting for three friends, including Samuel James and Lizette Lebron, at which the contents of a police promotional exam were to be disclosed.[30] A telephone conversation between Gordon and Lebron discussing the meeting was inadvertently recorded on Lebron's telephone.[31] In the conversation, Gordon told Lebron that there would be a meeting that night at his house to

20. MARTIN ET AL., *supra* note 8, at § 8.3.3.
21. 92 A.D.2d 154, 460 N.Y.S.2d 23 (1st Dep't 1983).
22. *Id.* at 161, 460 N.Y.S.2d at 27.
23. *Id.* at 161-62, 460 N.Y.S.2d at 27-28.
24. *See James*, 93 N.Y.2d at 631, 717 N.E.2d at 1060, 695 N.Y.S.2d at 721.
25. 93 N.Y.2d 620, 717 N.E.2d 1052, 695 N.Y.S.2d 715 (1999).
26. *Id.* at 632, 717 N.E.2d at 1058, 695 N.Y.S.2d at 721.
27. *Id.* at 626, 717 N.E.2d at 1054,695 N.Y.S.2d at 717.
28. *Id.*
29. *Id.* at 627, 717 N.E.2d at 1055, 695 N.Y.S.2d at 718.
30. *Id.* at 626, 717 N.E.2d at 1054, 695 N.Y.S.2d at 717.
31. *Id.*

disclose the answers to the promotional exam, which James and others would attend.[32]

At trial, Lebron testified that she was present at a study session at Gordon's apartment along with the defendant James.[33] Lebron also testified that Gordon distributed various questions that were ultimately included on the promotional examination.[34] When the prosecution called Gordon to testify, he invoked his privilege against self incrimination.[35] Subsequently, and over the defendant's objections, the recorded statements of Gordon to Lebron about the intended meeting were admitted under the state of mind exception to the hearsay rule.[36]

The defendant in *James* argued that Gordon's statement about the planned meeting should not have been admitted because it was really offered to prove the conduct of James, not Gordon.[37] The Court rejected this reasoning, noting that the same "analytical infirmities" concerning the admission of the tapes under the state of mind exception were also present in *Hillmon*.[38] Gordon's statement implies the existence of a prior discussion and agreement concerning the meeting that night.[39] Similarly, in *Hillmon*, Walters' statement of intention to accompany Hillmon implied that a prior discussion had taken place in which they had agreed to embark together on a trip.[40] The Court of Appeals refused to limit the exception to statements of future intent when offered only to prove the subsequent act of the declarant.[41]

The Court of Appeals, recognizing the dangers of unreliability in this hearsay exception, imposed limitations on admissibility.[42] It fashioned four foundational requirements. First, the declarant must be unavailable.[43] Second, the statement of the declarant's intent must unambiguously contemplate some future action by the declarant, either jointly with the non-declarant defendant or which requires the defendant's cooperation for its completion.[44] Third, to the extent that the declaration expressly or

32. *Id.*
33. *Id.* at 636, 717 N.E.2d at 1061, 695 N.Y.S.2d at 724.
34. *Id.*
35. *Id.* at 627, 717 N.E.2d at 1055, 695 N.Y.S.2d at 718.
36. 93 N.Y.2d at 628, 717 N.E.2d at 1057, 695 N.Y.S.2d at 718.
37. *Id.* at 630, 717 N.E.2d at 1057, 695 N.Y.S.2d at 720.
38. *Id.* at 631, 717 N.E.2d at 1057, 695 N.Y.S.2d at 720.
39. *Id.*, 717 N.E.2d at 1057, 695 N.Y.S.2d at 721.
40. *Id.*
41. 93 N.Y.2d at 636, 717 N.E.2d at 1061, 695 N.Y.S.2d at 724.
42. *Id.* at 633-34, 717 N.E.2d at 1059, 695 N.Y.S.2d at 722.
43. *Id.* at 634, 717 N.E.2d at 1060, 695 N.Y.S.2d at 723.
44. *Id.* at 634-35, 717 N.E.2d at 1060, 695 N.Y.S.2d at 723.

impliedly refers to a prior understanding, it must be inferable that the understanding occurred in the recent past and that the declarant was a party to it, or had complete knowledge of it.[45] Finally, there must be some independent evidence of reliability.[46]

In *James*, the statement satisfied these requirements. Gordon had invoked his privilege against self-incrimination and was sufficiently unavailable.[47] Gordon's statements involved his own future conduct along with that of the defendant and the other exam-takers.[48] It was also inferable from the evidence, that the arrangement for a meeting was recent and that Gordon was a party to it.[49] There was also independent, corroborative evidence supporting the notion that Gordon had arranged the meeting and that it actually occurred.[50]

B. Forfeiture of Objection by Wrongdoing

A party who procures the unavailability of a witness by violence, threats, or knowing acquiescence in wrongdoing, is precluded from asserting either a hearsay objection or a violation of the constitutional right of confrontation.[51] The effect of this well-known New York doctrine is to admit relevant hearsay which would otherwise be inadmissible. Thus, in *Geraci*, defendant was convicted of manslaughter based primarily on the grand jury testimony of an eyewitness who, because of intimidation, refused to testify at the trial.[52] The Court explained that this exception was not based upon the inherent reliability of this class of hearsay.[53] Rather, the exception is founded upon a rule of necessity to preserve the integrity of the adversary process by not allowing the party to profit from its wrongdoing in procuring witness unavailability and in order to reduce the "incentive to tamper with witnesses."[54]

Federal courts follow this same principle. Rule 804(b)(5) of the Federal Rules of Evidence codifies existing federal law and expressly provides for forfeiture of the right to object upon a showing that a witness has been rendered unavailable to testify through the misconduct of the

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45. *Id.* at 635, 717 N.E.2d at 1060, 695 N.Y.S.2d at 723.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 635-36, 717 N.E.2d at 1060-61, 695 N.Y.S.2d at 723-24.
51. People v. Geraci, 85 N.Y.2d 359, 365-66, 649 N.E.2d 817, 820-21, 625 N.Y.S.2d 469, 472-73 (1995).
52. *Id.* at 364-65, 649 N.E.2d at 820, 625 N.Y.S.2d at 472.
53. *Id.* at 367, 649 N.E.2d at 822, 625 N.Y.S.2d at 474.
54. *Id.* at 368, 649 N.E.2d at 822, 625 N.Y.S.2d at 474.

defendant personally or of others acting with defendant's knowing acquiescence.[55] There is, however, a difference between New York and federal law on the standard of proof required to invoke forfeiture of defendant's right to object. In *Geraci*, the New York Court of Appeals held that at a fact-based hearing, the people must demonstrate by *clear and convincing evidence* that the defendant caused the declarant witness's unavailability.[56] In this regard, *Geraci* differs from the federal standard which imposes only a *preponderance of the evidence* test to establish the defendant's wrongdoing.[57] Although *Geraci* requires that witness tampering be shown by clear and convincing evidence, it is not necessary that defendant's involvement be shown by direct evidence. At the fact-based hearing to determine if defendant's misconduct caused the unavailability of the witness, hearsay is admissible and, because of "the inherently surreptitious nature of witness tampering," circumstantial evidence may be used.[58]

During the *Survey* period the New York Court of Appeals revisited the *Geraci* principle. In *People v. Johnson*, the Court demonstrated that it takes seriously the requirements of a fact-based hearing and of clear and convincing evidence as necessary conditions for a forfeiture finding.[59] In this case, Johnson was convicted of sex crimes involving a twelve-year-old girl.[60] The victim testified against defendant before a grand jury.[61] But at the trial, she refused to answer any questions, repeatedly responding "I have nothing to say."[62] She indicated that she did not want to be there and would not explain her refusal to testify other than stating "because I choose not to."[63] At this point the trial judge granted the prosecutor's request to admit the girl's grand jury testimony.[64] Although the usual procedure is for the trial judge to hold a *Sirois* hearing before admitting the hearsay statement, the trial judge saw no need to hold a fact-based hearing because sufficient evidence that the victim's refusal was induced by defendant was

55. *See* United States v. Mastrangelo, 693 F.2d 269, 272-73 (2d Cir. 1982).
56. 85 N.Y.2d 359, 365, 649 N.E.2d 817, 820, 625 N.Y.S.2d 469, 472 (1995).
57. *Id.* at 366-67, 649 N.E.2d at 821-22, 625 N.Y.S.2d at 473-74 (rejecting the Federal preponderance of the evidence standard in favor of the more exacting clear and convincing test because the latter best recognizes the gravity of the interest at stake and most effectively balances the need to reduce the risk of error against the practical difficulties of proving witness tampering).
58. *Id.* at 369, 649 N.E.2d at 823, 625 N.Y.S.2d at 475.
59. 93 N.Y.2d 254, 711 N.E.2d 967, 689 N.Y.S.2d 689 (1999).
60. *Id.* at 257, 711 N.E.2d at 968, 689 N.Y.S.2d at 690.
61. *Id.*
62. 250 A.D.2d 922, 924, 673 N.Y.S.2d 755, 757 (3d Dep't 1998).
63. *Id.*
64. *Johnson*, 93 N.Y.2d at 257, 711 N.E.2d at 968, 689 N.Y.S.2d at 690.

already before the court.[65] The gist of the evidence at trial showed that defendant, using his position as a provider of pastoral and counseling services, acted as a surrogate father, with power to dominate the girl's decisions; letters demonstrated the victim's "obsessive craving" for defendant's presence and approval; defendant urged the girl to protect him by lying about their relationship and telling her that "only her words could send him to jail."[66] The trial court concluded that defendant had silenced this witness as a result of the "strong pressure exerted" on her.[67] Nevertheless, defendant's conviction was reversed by a divided appellate division and the reversal was affirmed by the Court of Appeals.[68]

In *Johnson*, the Court of Appeals found that the trial court committed reversible error by allowing the People to introduce the girl's grand jury testimony at trial without first holding a fact-based *Sirois* hearing to determine whether defendant was the cause of the girl's refusal to testify.[69] The Court emphasized that the *Sirois* hearing is no mere formality.[70] The hearing "plays the valuable role of sentry, admitting statements not subject to cross-examination only where the requisite link between the defendant's misconduct and the witness's silence has been established."[71] Unless waived by the defendant, the hearing is essential "for the People to prove, and the defendant to test, the People's proffered theory that a witness's unavailability is linked to the defendant's misconduct."[72] The *Sirois* hearing is appropriate, said the Court, whenever the People demonstrate a distinct possibility that a criminal defendant has engaged in witness tampering.[73]

The Court conceded that even without a hearing, the record did contain evidence supporting a conclusion that defendant had pressured the witness.[74] But this evidence was subject to competing inferences that needed to be explored and tested.[75] For example, the Court noted that defendant's telephone conversations exerting pressure on the witness and asking her to lie occurred before the defendant's arrest and before the girl

65. *Id.*
66. 250 A.D.2d at 926-27, 673 N.Y.S.2d at 758-59.
67. 93 N.Y.2d at 257, 711 N.E.2d at 968, 689 N.Y.S.2d at 690.
68. *Id.* at 259-60, 711 N.E.2d at 969-70, 689 N.Y.S.2d at 694.
69. 93 N.Y.2d at 259, 711 N.E.2d at 969, 689 N.Y.S.2d at 692.
70. *Id.*
71. *Id.* at 258, 711 N.E.2d at 968, 689 N.Y.S.2d at 690-91.
72. *Id.* at 258, 711 N.E.2d at 968, 689 N.Y.S.2d at 691.
73. *Id.* at 258, 711 N.E.2d at 968-69, 689 N.Y.S.2d at 691.
74. 93 N.Y.2d at 258, 711 N.E.2d at 969, 689 N.Y.S.2d at 691.
75. *Id.* at 259, 711 N.E.2d at 969, 689 N.Y.S.2d at 691.

voluntarily testified before the grand jury.[76] In short, the record evidence was insufficient to establish by clear and convincing evidence that defendant had procured unavailability of the witness at the trial.[77]

C. *Prior Witness Statements of Identification*

An out-of-court statement of identification at common law constitutes inadmissible hearsay. Sections 60.25 and 60.30 of the New York Criminal Procedure Law create statutory exceptions to the rule against hearsay.[78] These exceptions are limited in scope. Section 60.25, for example, allows a third party to testify to a declarant's prior identification only when the declarant testifies at trial and cannot identify the defendant "on the basis of present recollection."[79] In other words, the statute envisions that the declarant will testify about a prior identification but will indicate that he now cannot identify defendant because of a failure of memory. Then another person, usually a police officer, may testify that declarant previously identified the defendant.[80] Last year's *Survey* reported what appeared to be a misapplication of the statute by the Appellate Division, Second Department in *People v. Patterson*.[81] The Second Department there allowed third-party testimony about an unavailable declarant's prior identification.[82] The Court of Appeals has now confirmed our view and has reversed.[83]

In *Patterson*, the owner of a store who witnessed a robbery made a pretrial lineup identification.[84] The owner, however, died before trial of causes unrelated to the robbery.[85] The trial court permitted a police officer to testify at trial that the owner identified the defendant in a lineup.[86] The appellate division majority concluded that section 60.25 is applicable because the store owner, due to his death, was unavailable to make an in-court identification.[87] But the statute authorizes no such exception for an "unavailable" declarant who made the prior statement of identification.[88]

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76. *Id.*
77. *Id.* at 258, 711 N.E.2d at 969, 689 N.Y.S.2d at 691.
78. N.Y. CRIM. PROC. LAW §§ 60.25, 60.30 (McKinney 1999).
79. N.Y. CRIM. PROC. LAW § 60.25 (McKinney 1999).
80. MARTIN ET AL., *supra* note 8, at § 8.3.1.3 (discussing limitations on these statutory exceptions to the rule against hearsay).
81. 242 A.D.2d 740, 662 N.Y.S.2d 803 (2d Dep't 1997).
82. *Id.* at 742, 662 N.Y.S.2d at 805.
83. 93 N.Y.2d 80, 710 N.E.2d 665, 688 N.Y.S.2d 101 (1999).
84. 93 N.Y.2d at 82, 710 N.E.2d at 666, 688 N.Y.S.2d at 102 (1999).
85. *Id.*
86. *Id.* at 82, 710 N.E.2d at 666, 688 N.Y.S.2d at 103.
87. *Id.*
88. *Id.* (discussing N.Y. CRIM. PROC. LAW § 60.25).

Indeed, section 60.25 requires that the identifying declarant be available at trial since there must be testimony from the identifying declarant that "establishes . . . a lack of present recollection of the defendant as the perpetrator."[89]

As one might expect, the Court of Appeals was forced to reverse.[90] The People argued, and somehow managed to convince the Second Department majority that, because the identifying witness was dead, he therefore met the statutory definition of a witness who at the trial "was unable to state, based on present recollection, whether defendant was the person previously identified."[91] The Court called this interpretation "a novel, unprecedented extension of the explicit terms of the statute."[92] In ordering a new trial, the Court of Appeals explained that:

> [T]he testimony of a third party non-identifying witness is allowed as evidence-in-chief under the statute only when coupled with the real identifying witness's testimony as to the prior identification (CPL 60.25[2]). It is through this coupling that the testimony of both "witnesses" forms a complementary, reliable chain of evidence, linking the acceptance of the prior identification . . . The testimony of the third party, who witnessed the previous identification but not the crime, standing alone, cannot provide the indispensable safeguards of affording the defendant the benefit of probing cross-examination and the defensive development of reasonable doubt about the identification.[93]

In another significant decision, the Court of Appeals held for the first time in *People v. Wilder* that "negative identification evidence" may be admitted as evidence in chief in a criminal case.[94] Negative identification involves proof that the eyewitness who identified defendant in court had previously rejected another similar appearing suspect as the culprit.[95] Such evidence enhances the in-court identification by showing that the eyewitness had demonstrated that he was able to distinguish the actual perpetrator from other suspects.[96]

Undercover police detective Brown testified at trial to his participation in a buy/bust operation.[97] He stated:

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89. *Patterson*, 93 N.Y.2d at 83, 710 N.E.2d at 667, 688 N.Y.S.2d at 103.
90. *Id.* at 82, 710 N.E.2d at 666, 688 N.Y.S.2d at 102.
91. *Id.* at 83, 710 N.E.2d at 667, 688 N.Y.S.2d at 103.
92. *Id.*
93. *Id.* (citations omitted).
94. 93 N.Y.2d 352, 355, 712 N.E.2d 652, 653, 690 N.Y.S.2d 483, 485 (1999).
95. *Id.*, 712 N.E.2d at 654, 690 N.Y.S.2d at 486.
96. *Id.*
97. *Id.*, 712 N.E.2d at 653-54, 690 N.Y.S.2d at 485.

> [A] black male, about 6 feet tall, weighing 200 pounds, with a little facial hair and a scar on his left cheek, wearing a black "bubble" coat with brown paint spattered on the sleeve, a black ski hat, blue jeans and tan boots, directed the detective to a second individual who provided him with cocaine and accepted payment. Detective Brown identified defendant at trial as the "steerer" in this transaction. In addition, over defense counsel's objection, Detective Brown was permitted to testify that when other officers apprehended a suspect later that afternoon, a black male wearing a black bubble jacket and a black ski hat, he observed the suspect and told the officers that it was not the individual who had participated in the drug sale. That suspect ultimately was exonerated from any complicity in the sale.[98]

The Court of Appeals approved admissibility of the negative identification testimony.[99] Prior Court of Appeals justices had expressed conflicting views on negative identification evidence in concurring and dissenting opinions.[100] One expression, for example, called it "both non probative and hearsay."[101] In opting for admissibility, the Court in *Wilder* bypassed the hearsay issue and justified its decision on grounds of relevancy.[102] "Evidence that enhances the likelihood of the accuracy of an eyewitness identification is relevant."[103] The Court indicated that in order to be relevant there has to be a similarity of appearance between the accused and the suspect who was negatively identified; a condition that was met in *Wilder*.[104]

D. Confrontation and the Declaration Against Penal Interest

Under New York and federal law, declarations against penal interest made by an unavailable declarant constitute an exception to the rule against hearsay.[105] The rationale for the exception is that a person is unlikely to make an untrue statement that is against his interest at the time the statement was made.[106] A difficult situation is presented when declarant, an accomplice, is in police custody and implicates himself and the accused

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98. *Id.* at 355-56, 712 N.E.2d at 653-54, 690 N.Y.S.2d at 485-86.
99. *Id.* at 358, 712 N.E.2d at 655, 690 N.Y.S.2d at 487.
100. *Id.* at 356, 712 N.E.2d at 654, 690 N.Y.S.2d at 486.
101. 93 N.Y.2d at 356, 712 N.E.2d at 654, 690 N.Y.S.2d at 486.
102. *Id.* at 356-57, 712 N.E.2d at 654, 690 N.Y.S.2d at 486-87.
103. *Id.* at 357, 712 N.E.2d at 654, 690 N.Y.S.2d at 486.
104. *Id.* at 357, 712 N.E.2d at 655, 690 N.Y.S.2d at 486-87.
105. People v. Brown, 26 N.Y.2d 88, 91, 257 N.E.2d 16, 17, 308 N.Y.S.2d 825, 827 (1970); FED. R. EVID. 804(b)(3); *see* MARTIN ET AL., *supra* note 8, at § 8.4.2.3 (discussing the declaration against interest exception).
106. *Brown*, 26 N.Y.2d at 92, 257 N.E.2d at 18, 308 N.Y.S.2d at 828.

in criminal activity.[107] When such a statement is offered against the accused, it is unlikely to be admitted for one or both of two reasons. First, it may not qualify under the exception because it is ordinarily not sufficiently disserving. In this situation, the accomplice is likely to have a strong motive to falsify in order to shift or share blame and in order to obtain a favorable plea bargain. Second, even if it does qualify under state law as a declaration against interest, it may still run afoul of the accused's Sixth Amendment right to confront the witnesses against him.

The difficulty of trying to admit accomplice confessions that implicate the accused was highlighted in *Lilly v. Virginia,* a Confrontation Clause case, decided during the *Survey* period by the United States Supreme Court.[108] In *Lilly*, all the justices agreed on one thing; that on the facts of this murder case, admissibility of the non-testifying accomplice's confession violated defendant's confrontation rights.[109] On the foundation for this conclusion, the justices were sharply divided.[110]

The factual background involved Lilly, his brother Mark, and another accomplice who were arrested at the end of a two day crime spree, during which they stole liquor and guns, and kidnapped and murdered the victim.[111] Under police questioning, Mark admitted his own role in the crimes, but claimed that Lilly was the one who stole weapons and committed the murder.[112] The government called Mark as a witness at Lilly's murder trial, but Mark invoked his Fifth Amendment privilege against self-incrimination.[113] The Virginia trial court then admitted Mark's statements to the police as declarations of an unavailable witness against penal interest.[114] The trial court rejected the argument that the statements were not against Marks' penal interest because they shifted responsibility for the crimes to petitioner and also found that their admission did not violate petitioner's Sixth Amendment confrontation rights.[115] As to the hearsay objection, the court reasoned that the confession was a statement that tended to expose the hearsay declarant to a risk of criminal punishment, and thus qualified as a declaration against penal interest under Virginia law.[116] In terms of the confrontation clause problem, the trial

107. *Id.* at 93, 257 N.E.2d at 18, 308 N.Y.S.2d at 828.
108. 527 U.S. 116 (1999).
109. *Id.* at 116.
110. *Id.* at 116-19.
111. *Id.* at 120.
112. *Id.* at 121.
113. 527 U.S. at 121.
114. *Id.* at 122.
115. *Id.*
116. *Id.*

court relied on Supreme Court authority that hearsay statements falling within "firmly rooted" hearsay exceptions do not violate the right to confrontation.[117] Because it was on a state law matter, the Supreme Court had to assume that Mark's statement satisfied the state hearsay exception.[118] The only federal issue for the justices was "whether the accused's Sixth Amendment right 'to be confronted with the witnesses against him' was violated."[119]

In *Ohio v. Roberts*, the Supreme Court had stated that the underlying purpose of the Confrontation Clause is to ensure the reliability of the evidence against an accused by subjecting it to rigorous testing by cross-examination in the context of an adversary proceeding.[120] It went on to say that hearsay statements of an unavailable witness may still be admitted without such cross-examination only in two situations.[121] A violation of the Confrontation Clause is avoided if (1) the out-of-court statements fall "within a firmly rooted hearsay exception"[122] or (2) they contain "particularized guarantees of trustworthiness" such that adversarial testing by cross-examination would be expected to add little, if anything, to their reliability.[123]

In *Lilly*, the plurality opinion of four justices explained why, on the facts, the non-testifying accomplice's statement failed both prongs of the *Roberts* test.[124] First, the practice of admitting accomplice statements partially inculpating the accused is of recent vintage and such statements are "inherently unreliable."[125] Accordingly, a hearsay exception for such statements cannot be called "firmly rooted."[126] Second, these kinds of statements do not meet the alternative *Roberts* test of particularized guarantees of trustworthiness.[127] In fact, said the plurality, a presumption of unreliability attaches to accomplice confessions that shift or spread blame.[128] Here, the opinion specifically refuted the reasons given by the Commonwealth for its findings of trustworthiness. Evidence corroborating

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117. *Id.*
118. 527 U.S. at 123.
119. *Id.* at 120.
120. 448 U.S. 56, 63 (1980).
121. *Id.* at 66.
122. *Id.*
123 *Id.*
124. *Lilly*, 527 U.S. at 125-34.
125. *Id.* at 131.
126. *Id.* at 125.
127. *Id.* at 125, 135.
128. *Id.* at 133.

some portions of the accomplices' statement was irrelevant.[129] The State cannot "'bootstrap on' the trustworthiness of other evidence."[130] The fact that the accomplice was Mirandized before giving his statements does not make them significantly more trustworthy.[131] In fact, the court said that a suspect's knowledge that anything he says may be used against him gives him a motive to falsify and "militates against depending on his veracity."[132] The fact that the accomplice knew that "he was exposing himself to criminal liability—merely restates the fact that portions of his statements were technically against penal interest."[133] Nor did the absence of an express promise of leniency in exchange for cooperation enhance his statements' reliability to the level required for their untested admission.[134] The plurality concluded that neither the words the accomplice spoke, nor the setting in which he was questioned, provided a sufficient basis for concluding that the statements were so reliable that there was no need to subject them to the rigors of the adversarial process.[135] The plurality made no apology for delving into and refuting the Virginia court's findings of trustworthiness.[136] It made clear that there was no reason for appellate courts to defer to lower court findings on this issue.[137] As with other "fact-intensive mixed questions" of law, independent review is necessary.[138] An appellate court must decide for itself whether the guarantees of trustworthiness urged by the government satisfy the demands of the Confrontation Clause.[139]

The Supreme Court has yet to find and agree upon a clear Confrontation Clause theory that will resolve the tensions between admissible hearsay and the Confrontation Clause. This is reflected in *Lilly* by the fact that even though all justices agreed on the result, the Court could not fashion majority agreement on the rationale.[140] Nevertheless, *Lilly* emphasizes that non-testifying accomplice confessions are unlikely to

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129. *Id.* at 134.
130. *Id.* at 138.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 139.
135. 448 U.S. at 139.
136. *Id.* at 135-36.
137. *Id.*
138. *Id.* at 136.
139. *Id.*
140. The plurality opinion of Justice Stevens contained only three sections in which all of the justices joined - a statement of facts, a discussion of jurisdiction and a brief statement of the holding that found a Confrontation Clause violation. There were three separate concurring opinions. *See generally Id.* at 56.

be admitted when offered against the accused.

Under very narrow circumstances, New York courts have permitted the use of guilty plea allocution statements of a non-testifying co-defendant against a remaining defendant who chooses to go to trial.[141] This evidence, if sufficiently reliable on the facts, is considered admissible for a limited purpose as a declaration against penal interest.[142]

The leading case allowing such use of co-defendant allocution statements was *People v. Thomas*.[143] In *Thomas*, the co-defendant had allocuted to restraining victims while "another person" grabbed their jewelry.[144] Later, at trial, the fact that Thomas as "aided by another person actually present" was a required element of the crime of which Thomas was charged.[145] The co-defendant's allocution was admitted in Thomas' trial with limiting instructions, indicating that the information was admitted only to establish whether more than one person was involved in the crime.[146] The Court found that the co-defendant's allocution–that he held the victims during the crimes—was wholly disserving and directly contrary to his penal interest.[147] That allowed its exceptional admission in Thomas' trial, and the People were able to use the co-defendant's guilty plea statements to establish the co-defendant's presence at the crime scene.[148]

The narrowness of this exception was emphasized in *People v. Blades*,[149] which was decided during this *Survey* year. In this case, Blades and one, Marshall, forced their way into a Manhattan apartment, bound the occupant's wrists, and threatened him with a gun and a pipe.[150] Following their arrest, Marshall decided to plead guilty to the reduced charge of attempted burglary in the first degree in satisfaction of the entire indictment.[151] As a condition of the plea bargain, the prosecution required that he recount, as part of his guilty plea allocution, the involvement of the accomplice and the accomplice's name.[152] Marshall complied by naming Blades as his confederate.[153]

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141. People v. Thomas, 68 N.Y.2d 194, 195, 500 N.E.2d 293, 293-94, 507 N.Y.S.2d 973, 973-74 (1986); MARTIN ET AL., *supra* note 8, at § 8.4.2.
142. *Id.* at 197, 500 N.E.2d at 294, 507 N.Y.S.2d at 974.
143. *Id.* at 194, 500 N.E.2d at 293, 507 N.Y.S.2d at 973.
144. *Id.* at 196, 500 N.E.2d at 294, 507 N.Y.S.2d at 974.
145. 68 N.Y.2d at 196, 500 N.E.2d at 294, 507 N.Y.S.2d at 974.
146. *Id.*
147. *Id.* at 199-200, 500 N.E.2d at 296, 507 N.Y.S.2d at 976.
148. *Id.* at 199, 500 N.E.2d at 296, 507 N.Y.S.2d at 976.
149. 93 N.Y.2d 166, 711 N.E.2d 187, 689 N.Y.S.2d 1 (1999).
150. *Id.* at 169, 711 N.E.2d at 189, 689 N.Y.S.2d at 2.
151. *Id.*
152. *Id.*
153. *Id.*

When the prosecution later sought to use Marshall as a witness at Blades' trial, Marshall invoked his privilege against self-incrimination and refused to testify.[154] As a fallback, the People proffered an excerpt from Marshall's guilty plea allocution.[155] It was redacted, and the terms "second individual" or "second person" were substituted for Blades' name.[156] The trial court allowed the People to present this redacted material for the jury's consideration.[157]

The Court of Appeals found error.[158] Here the allocution statements did not serve to establish any of the elements of the crimes for which Blades was on trial. Unlike the situation in *Thomas*, defendant here was not charged with acting with another person so as to make the allocution admissible for the limited purpose of showing concert of action.[159] Moreover, the Court found that Marshall's statement was not really against his penal interest.[160] Under the terms of his plea bargain, Marshall was required to implicate Blades.[161] Therefore, the plea bargain and the allocution "became particularly within interest, rather than against his interest."[162] Thus *People v. Blades*,[163] like *Lilly v. Virginia*,[164] show the difficulty of fitting in-custody statements of accomplices into the "against penal interest" exception to hearsay.

E. Residual Hearsay

Rule 807 of the Federal Rules of Evidence provides for the admissibility of hearsay not falling within traditional exceptions if the court concludes, among other things, that "circumstantial guarantees of trustworthiness" exist that are equivalent to those in other exceptions and if the hearsay statement is more probative "than any other evidence which the proponent can procure through reasonable efforts."[165] This so-called "catch-all exception" was prominently featured in the recent Second Circuit decision in *Schering Corp. v. Pfizer, Inc.*[166]

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154. 93 N.Y.2d at 169, 711 N.E.2d at 189, 689 N.Y.S.2d at 2.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 173, 711 N.E.2d at 191, 689 N.Y.S.2d at 5.
159. 93 N.Y.2d at 174, 711 N.E.2d at 191, 689 N.Y.S.2d at 5-6.
160. *Id.* at 175, 711 N.E.2d at 192, 689 N.Y.S.2d at 6.
161. *Id.*
162. *Id.*
163. *Id.* at 176-77, 711 N.E.2d at 193, 689 N.Y.S.2d at 7.
164. 527 U.S. at 116.
165. FED. R. EVID. 807.
166. 189 F.3d 218 (2d Cir. 1999).

Schering involved the admissibility of survey evidence.[167] Survey evidence is often admitted to prove secondary meaning, confusion in unfair competition or trademark cases or the generic quality of trade names.[168] In these situations the surveys report the statements of consumers in order to show their beliefs. Therefore, reports of customer statements can survive hearsay objection because they qualify under the exception for statements of declarant's present state of mind.[169]

In *Schering*, the hearsay problem was more acute. Schering markets its antihistamine, Claritin, largely on the ground that it gives allergy relief without causing drowsiness.[170] In clinical tests, Pfizer's competing product, Zyrtec, caused considerable sedation.[171] Schering sued Pfizer under the Latham Act for misrepresenting the sedation effect of Zyrtec.[172] In a settlement agreement, Pfizer agreed that it would not promote Zyrtec as non-sedating.[173] Subsequently, Schering sued Pfizer again, this time for violating the settlement agreement.[174] Schering alleged that Pfizer's sales representatives were misrepresenting Zyrtec by telling doctors during one-on-one meetings that their product was low sedating or non-sedating.[175] In order to prove Pfizer's false promotion, Schering offered a number of

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167. *Id.* at 221.

168. Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670, 682 (S.D.N.Y. 1963) established the trend toward admissibility. *See also* Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 973 F.2d 1033, 1043 (2d Cir. 1992) (secondary meaning); PPX Enters., Inc. v. Audiofidelity Enters., Inc., 818 F.2d 266, 271 (2d Cir. 1987) (actual confusion); Nestle Co. v. Chester's Market, Inc., 571 F. Supp. 763, 769-70, 773-75 (D. Conn. 1983) (genericness of name). *See generally* MARCIA B. PAUL & ANTHONY F. LOCICERO, LITIGATING TRADEMARK, SECTION 43(A) AND UNFAIR COMPETITION CASES, P.L.I. PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES NO. G4-3925 (Oct. 1994) (describing use of surveys in trademark and false advertising context).

169. *Schering*, 189 F.3d at 225. FED. R. EVID. 803(3) creates an exception to the hearsay rule for statements that express a declarant's state of mind at the time of the utterance. In trademark or Latham Act cases, surveys are routinely admitted to establish actual confusion or secondary meaning. The surveys poll individuals about their presently existing states of mind to establish facts about the groups' mental states. *See* cases cited in *Schering*, 189 F.3d at 227 which include Sterling Drug, Inc. v. Bayer AG, 14 F.3d 733, 741-42 (2d Cir. 1994) (polling consumers for their then-exiting perceptions to establish actual confusion); *Mobil Oil Corp.*, 818 F.2d at 259 (same); Harlequin Enters. Ltd. v. Gulf & Western Corp., 644 F.2d 946, 949-50 (2d Cir. 1981) (polling consumers for their then-existing states of mind to establish secondary meaning, or tendencies to associate certain product features with a particular corporate origin).

170. 189 F.3d at 221.

171. *Id.* at 222.

172. *Id.*

173. *Id.*

174. *Id.* at 223.

175. 189 F.3d at 223.

surveys.[176] Some of these reported what doctors said that they were told by Pfizer's sales representatives.[177] In this situation the doctors' states of mind were not relevant. So the state of mind exception did not apply. Since the surveys were reporting what the doctors said that the representatives said, no traditional exception applied. In part for this reason, the district court excluded the surveys.[178]

The Second Circuit reversed for several reasons; one of which was because the lower court had failed to give proper consideration to the residual exception.[179] The Court of Appeals explained that proper survey methodology can reduce the risk of two of the classic hearsay dangers: insincerity and faulty narration.[180] Moreover, the surveys tended to corroborate each other.[181] The observations of the doctors were solicited within a day of their meeting with Pfizer representatives.[182] These factors minimized the dangers of faulty memory and perception.[183] Therefore, methodologically proper surveys carry special guarantees of trustworthiness.[184] The court also suggested that the necessity prong of the residual exception was met.[185] The surveys were more probative than other evidence. The surveys involved over a thousand doctors. It would be unreasonable or impossible to bring to court or to depose the surveyed doctors in sufficient numbers to establish the facts in a statistically proper

176. *Id.* at 223.
177. *Id.* at 222-23.
178. *Id.* at 224.
179. Altogether, five surveys were offered. One survey was commissioned by Pfizer itself and was held admissible as a party admission under Federal Rule of Evidence 801(d)(2). Other surveys asked the doctors polled "what was the main message" of the presentation made to you by the Pfizer representative. These were held admissible under Federal Rule of Evidence 803(3), the state of mind exception, because they showed the declarant doctors' states of mind. The Court of Appeals found that the doctors' mental impressions were relevant because the settlement agreement forbade Pfizer representatives from expressly or "*by implication*" leaving the impression that its product was non-sedating. 189 F.3d at 230. There were also surveys that asked the doctors "What did the representatives say about the product and sedation?" and "Did the rep say anything about Zyrtec and sedation?" Since Federal Rule of Evidence 803(3) explicitly excludes from its purview any "statement of memory or belief to prove the fact(s) remembered or believed," the doctors' recitations of what they had been told would not qualify under the state of mind exception. But the Court of Appeals held that the district court erred in not properly considering admissibility of the surveys under the residual exception. 189 F.3d at 221, 235-36.
180. *Schering*, 189 F.3d at 233-34.
181. *Id.* at 236.
182. *Id.*
183. *Id.*
184. *Id.* at 234-36.
185. 189 F.3d at 236-37.

way.[186] Nor could they be examined until long after the transactions about which they were to testify; thus raising memory concerns.[187]

Schering v. Pfizer is a significant opinion because it adds the residual exception as another vehicle to admit properly conducted survey evidence.[188]

II. OPINIONS AND EXPERTS

A. Daubert in New York

Over the last seven years, federal law on expert testimony has developed rapidly. Now there are some early signs that federal developments are influencing New York decisions.

On the federal side, standards for expert testimony changed with the 1993 United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[189] As explained in last year's *Survey*, the Court in *Daubert* abandoned the *Frye* "general acceptance" test for scientific evidence in federal courts.[190] The Court went on to state, however, that under Federal Evidence Rule 702, the trial judge must act as a gatekeeper.[191] As a condition to admissibility, the proponent of scientific expertise must satisfy the judge that the methodology is scientifically valid.[192] The Supreme Court laid out certain criteria to assist in the determination of reliability.[193] These criteria require the trial judge to assess (1) whether the theory underlying the opinion is able to be tested; (2) whether the scientific technique has been tested; (3) whether the theory or technique had been subject to peer review; (4) the known or potential rate of error of the particular technique and the maintenance of standards for controlling the rate of error; (5) the degree of acceptance of the theory or technique within the scientific community.[194] This decision mandates careful scrutiny of complicated expert testimony.

Does *Daubert*'s strict criteria apply to an expert opinion that involves only "technical or other specialized knowledge" as well as to "scientific

186. *Id.*
187. *Id.*
188. *Id.* at 230-31.
189. 509 U.S. 579 (1993).
190. 509 U.S. at 597.
191. *Id.* at 592-93.
192. *Id.*
193. *Id.* at 593-94.
194. *Id.*

knowledge"?[195] Does it apply when the expert's conclusions are not based on a scientific theory or methodology but simply on skill-based experience and training? The United States Supreme Court answered affirmatively in its 1999 decision in *Kumho Tire Co. v. Carmichael*.[196] In *Kumho*, the trial judge excluded a tire expert's opinion that was based almost exclusively on skill-based examination of the allegedly defective tire, because the opinion failed the *Daubert* test.[197] The Eleventh Circuit, however, reversed the exclusion on the ground that the *Daubert* factors apply only to testimony based on the "application of scientific principles" and not to expert testimony based on "skill or experience-based observation."[198] This is the approach that had been followed in the Second Circuit.[199] In *Kumho*, the United States Supreme Court determined that the *Daubert* factors for determining the admissibility of expert testimony may be applied to the testimony of engineers and other experts who are not scientists.[200] Therefore, *Daubert* applies to all expert testimony.[201] *Daubert*'s list of specific factors is illustrative, said the Court, and it granted district courts broad latitude to determine which criteria to apply and how to apply them; determinations which are reviewable on appeal only for abuse of discretion.[202]

Thus, expert testimony of all kinds in federal courts is now governed by the unitary standard encapsuled in *Daubert*. This approach is fortified by a proposed amendment to Federal Evidence Rule 702.[203] The proposal, if approved by the Supreme Court and if Congress takes no action, would be effective on December 1, 2000. It would admit expert testimony only if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[204] The obvious purpose and effect of this amendment is to make clear that

195. FED. R. EVID. 702 defines experts as those qualified in "scientific, technical or other specialized knowledge."

196. 526 U.S. 137, 141 (1999).

197. Carmichael v. Samyang Tires, Inc., 923 F. Supp. 1514, 1520 (S.D. Ala. 1996).

198. Carmichael v. Samyang Tires, Inc., 131 F.3d 1433, 1435 (11th Cir. 1997).

199. *See* Liriano v. Hobart Corp., 949 F. Supp. 171, 177 (S.D.N.Y. 1996); United States v. Starzecpyzel, 880 F. Supp. 1027, 1029 (S.D.N.Y. 1995).

200. *Kumho Tire*, 526 U.S. at 149.

201. *Id.*

202. *Id.* at 149-52.

203. Proposed Amendment to FED. R. EVID. 702 was promulgated by Judicial Conference of the United States and forwarded on December 6, 1999, to the United States Supreme Court for approval.

204. *Id.*

Daubert applies in federal courts to all expert testimony.[205]

What about New York State courts? What admissibility standards guide state judges in assessing the reliability of expert testimony? Unlike its federal counterpart, New York has retained the supposedly stricter *Frye* "general acceptance" test for novel scientific evidence.[206] Therefore, although *Daubert* on the federal side held *Frye* superseded by the Federal Rules of Evidence, New York in *People v. Wesley* retained the requirement that the experts' methodology be found "generally acceptable as reliable" by "the relevant scientific community."[207] But what if the expert testimony is outside the realm of "novel scientific evidence"? In that case, there are now indications among some lower courts that the federal *Daubert* criteria should apply.[208] In other words, a dual standard appears in the making: *Frye* general acceptance for novel scientific evidence; *Daubert* analysis for all other expertise.

Wahl v. American Honda Motor Co.,[209] decided during the *Survey* period, is an example. *Wahl* was a products liability case in which plaintiff claimed injury resulting from a design defect in a three-wheeled recreational vehicle.[210] The issue was whether the opinion of plaintiff's expert, Dr. Wright, a mechanical engineer, was sufficiently trustworthy.[211] Defendant objected on the ground that the principle espoused by the expert had not been "generally accepted in the engineering community."[212] The court concluded that where "evidence is not scientific or not novel, the

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205. Advisory Committee on The Federal Rules of Evidence Committee Note to Proposed Amendment to FED R. EVID. 702 states:

> The amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist.

206. People v. Wesley, 83 N.Y.2d 417, 422, 633 N.E.2d 451, 454, 611 N.Y.S.2d 97, 100 (1994).

207. *Id.* at 422-23, 633 N.E.2d at 454, 611 N.Y.S.2d at 100.

208. Wahl v. American Honda Motor Co., 181 Misc. 2d 396, 398, 693 N.Y.S.2d 875, 877-78 (Sup. Ct., Suffolk Co. 1999); Clemente v. Blumenberg, N.Y.L.J., Sept. 13, 1999, at 31 (Sup. Ct., Richmond Co., Sept. 13, 1999); City of New York v. Richard Basciano, No. 402063/93 (Sup. Ct., N.Y. Co. 1999) (Judge Stephen Crane), *described in* Michael. Hoenig, *Gatekeeping Experts Under 'Frye' and 'Daubert*, N.Y.L.J., Oct. 20, 1999, at 3.

209. 181 Misc. 2d at 396, 693 N.Y.S.2d at 875.

210. *Id.* at 397, 693 N.Y.S.2d at 876.

211. *Id.*at 398, 693 N.Y.S.2d at 877.

212. *Id.*

Frye analysis is not applicable."[213] Inasmuch as the testimony here was that of an engineer and inasmuch as it was based upon recognized technical or other specialized knowledge, the court found "that the stricter general acceptance standard of *Frye* is not applicable."[214] Instead the court applied "the reliability standard as derived from *Daubert* and *Kumho Tire*."[215] Therefore, the trial judge held a *Daubert* hearing.[216] The court considered each of the *Daubert* factors of testability, peer review, error rate and acceptability and found that plaintiff experts passed these tests.[217] The court concluded:

> Given Dr. Wright's knowledge of mathematics and physical engineering principles; his teaching, practical experience and technical engineering background; peer review of his presented papers; lack of dispute after presentation of such papers by the relevant engineering community; the small opportunity for potential rate of error; the availability of mathematic and engineering principles to test Dr. Wright's theory and the fact that Dr. Wright testified that the theory is grounded upon long-standing mathematic and engineering principles and lack of contradiction, the court finds that Dr. Wright's testimony is sufficiently trustworthy and reliable to be presented to, and considered by, the jury."[218]

B. Federal Appellate Review of Expert Testimony

In *General Electric Co. v. Joiner*, the United States Supreme Court held in 1997 that "abuse of discretion," the standard ordinarily applicable to review evidentiary rulings, is the proper standard to review a federal district court's decision to admit or to exclude expert scientific evidence.[219] The Court went on to hold that an appeals court in applying this standard "may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it."[220] In addition, it rejected the argument that, when the result of excluding the opinion leads to summary judgment against the proponent, a more searching standard of review is appropriate."[221]

The Supreme Court has now rendered a significant decision which

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213. *Id.* at 398-99, 693 N.Y.S.2d at 877.
214. *Id.*
215. *Id.* at 399, 693 N.Y.S.2d at 877-78.
216. *Id.* at 399, 693 N.Y.S.2d at 878.
217. *Id.*
218. *Id.*
219. 522 U.S. 136, 139 (1997).
220. *Id.* at 142.
221. *Id.* at 143.

enhances the power of federal courts in reviewing evidentiary rulings on expert testimony. It also increases the plight of plaintiffs whose expert testimony is essential in order to avoid dismissal. In *Weisgram v. Marley Co.*, the United States Supreme Court ruled on the following scenario: Plaintiff in a product liability action wins a jury verdict based upon plaintiff's expert testimony which was admitted at trial.[222] Defendant argues in a motion for judgment notwithstanding the verdict before the trial court that plaintiff's expert testimony was unreliable and, therefore, should not have been admitted under *Daubert*.[223] Shorn of the erroneously admitted expertise, plaintiff's evidence is insufficient to justify a jury verdict.[224] This argument was rejected in the trial court but was upheld in appellate court. What happens now? "May the Court of Appeals then instruct the entry of judgment as a matter of law for defendant, or must that tribunal remand the case, leaving to the district court's discretion the choice between final judgment for defendant or a new trial of plaintiff's case?"[225]

The Supreme Court held that judgment may be entered for the defendant as a matter of law.[226] In other words, the Court of Appeals may, but is not required to, remand for the district court to decide between a new trial and judgment for the defendant.[227] On this question, the circuits had been split. Rule 50(d) of the Federal Rules of Civil Procedure dealing with post-trial motions is silent on the question.[228] The Supreme Court rejected arguments that plaintiffs should have a second chance because they might have produced additional or alternative evidence if they had known that their expert testimony would be found inadmissible.[229]

C. Appropriateness of Expert Testimony

In assessing the appropriateness of expert testimony, New York courts require that the testimony be sufficiently "beyond the ken" of the ordinary

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222. 120 S. Ct. 1011 (2000).
223. *Id.* at 1012-13.
224. *Id.* at 1015.
225. *Id.*
226. *Id.*
227. 120 S. Ct. at 1015.
228. *Id.* at 1018.
229. The Court stated that it:

> is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail. We therefore find unconvincing Weisgram's fears that allowing courts of appeals to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other means had they known their expert testimony would be found inadmissible.

Id. at 1021.

juror so that it would assist the trier of fact.[230] In other words, the expert will not be allowed to address issues within the ordinary awareness or intelligence of the jury. If an expert opinion involves novel scientific evidence, then a second hurdle is presented. As stated above, the methodology must have achieved "general acceptance" in the appropriate scientific community.[231]

Among a group of routine cases involving these standards during the *Survey* period, one lower court decision stands out as involving an interesting and unusual form of expertise. In *People v. Phillips*, defendant was charged with a series of sexual assaults.[232] During pre-trial interrogation, the defendant made admissions of guilt.[233] At his trial, the accused offered the testimony of an "expert witness in the field of voluntary confessions."[234] The "voluntariness" expert, a lawyer and a psychologist, sought to testify about factors such as the "penitent atmosphere in which the admissions were made" and the "highly suggestive state of defendant's mind at the time."[235] The expert would also explore defendant's past history with the police and how this contact created an atmosphere of fear during the interrogation of defendant.[236] The accused argued that these considerations would aid the jury in determining the voluntariness of his confession.[237]

The Court considered first whether the subject matter of this testimony was "outside the understanding of an average juror" as opposed to being within their normal understanding.[238] The court concluded somewhat tentatively that the expert's testimony may well be beyond the general awareness of the average juror.[239] Here the court noted that the expert would deal with some matters outside of normal jury knowledge such as (1) the psychological factors affecting confessions; (2) the frequency of false confessions; (3) the failure of the police to verify such confessions; (4) the general tendency of prosecutors to cease investigating

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230. De Long v. County of Erie, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983); Kulak v. Nationwide Mutual Ins. Co., 40 N.Y.2d 140, 148, 351 N.E.2d 735, 740, 386 N.Y.S.2d 87, 92 (1976); Fortunato v. Dover Union Free Sch. Dist., 224 A.D.2d 658, 638 N.Y.S.2d 727 (2d Dep't 1996).

231. People v. Wesley, 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994).

232. People v. Phillips, 180 Misc. 2d 934, 692 N.Y.S.2d 915 (Sup. Ct., Queens Co. 1999).

233. *Id.* at 935, 692 N.Y.S.2d at 915.

234. *Id.*

235. *Id.* at 936, 692 N.Y.S.2d at 916.

236. *Id.*

237. *Id.*

238. *Id.* at 939, 692 N.Y.S.2d at 918.

239. *Id.*

a crime once a confession has been obtained; (5) the harm caused to society and individuals by coerced or false confessions.[240]

The Court then moved on to the second test: Was this expert testimony based upon a scientific principle or procedure which has been sufficiently established to have gained general acceptance in the particular field in which it belongs?[241] The trial judge concluded that the expertise failed this test.[242] He found no reported New York cases approving this novel type of evidence.[243] Novelty, said the court, is often a barrier to scientific evidence because it means that "it clearly has not yet been evaluated by the scientific community and, thus, lacks general professional acceptance."[244] In excluding this expertise, the court also noted that defendant had not shown any specific scientific tests or recognized procedures or findings which would form the basis for an evaluation of the voluntariness of the admissions.[245]

D. Learned Treatises

Federal Rule of Evidence 803(18) provides a hearsay exception for learned treatises. This exception covers books or periodicals "established as reliable authority by the testimony or admission of the witness or by other expert testimony or judicial notice."[246] That is not, however, the law in New York. Under current law in our state, such authoritative written works may not be admitted for their truth, but only to impeach an opposing expert and then only if the expert has accepted the work as authoritative.[247]

New York's limitation on the admissibility of authoritative writings was reaffirmed by the New York Court of Appeals in *Spensieri v. Lasky*.[248]

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240. *Id.* at 938, 692 N.Y.S.2d at 917.
241. *Id.* at 939-40, 692 N.Y.S.2d at 918.
242. 180 Misc. 2d at 940, 692 N.Y.S.2d at 919.
243. *Id.* at 939-40, 692 N.Y.S.2d at 918.
244. *Id.* at 940, 692 N.Y.S.2d at 918.
245. *Id.* at 940, 692 N.Y.S.2d at 919.
246. FED R. EVID. 803(18). The rationale for admitting such treatises for the truth of their content is that they contain sufficient assurances of truthworthiness to justify excepting them from the rule against hearsay. Indeed, they are arguably more reliable than the in-court testimony of the paid expert whose opinion was solicited and prepared in anticipation of the particular litigation. The author of the treatise has no interest in any particular case and is motivated to write by a desire to convey an accurate and complete picture of the subject for use by other professionals. The author knows his writings will be scrutinized and criticized by his peers and that errors are likely to be exposed by other authorities in the field.
247. People v. Feldman, 299 N.Y. 153, 85 N.E.2d 913 (1949). MARTIN ET AL., *supra* note 8, at § 7.7.
248. 94 N.Y.2d 231, 723 N.E.2d 544, 701 N.Y.S.2d 689 (1999).

In this medical malpractice case the court held that the Physicians Desk Reference (PDR), an encyclopedia of medications written and compiled by drug manufacturers, containing dosage and side effect warnings was inadmissible hearsay.[249]

In *Spensieri*, the plaintiff, age 29, suffered a stroke that rendered her a quadriplegic.[250] The stroke occurred after defendant doctors prescribed two drugs, an oral contraceptive called Ortho-Novum and the estrogen Estinyl, in an effort to treat plaintiff's uterine bleeding.[251] At trial, Spensieri sought to introduce "product information" excerpts from the PDR.[252] Her medical expert characterized the information as authoritative concerning the use and administration of drugs and further testified that manufacturers, by law, must provide this information to the Food and Drug Administration (FDA).[253] He specifically noted that the PDR was a standard of care for physicians relative to the use and administration of Ortho-Novum.[254] Spensieri then offered into evidence those portions of the PDR pertaining to Ortho-Novum.[255] The trial court sustained defendants' objection on hearsay grounds.[256]

The Court of Appeals agreed that, since the PDR excerpts were offered for their truth, they were hearsay.[257] The Court noted that in many other jurisdictions, the PDR is admissible in malpractice cases, by itself, as prima facie evidence of the medical standard of care.[258] Indeed, the Court conceded that two Appellate Division Departments[259] had adopted the so-called "*Mulder* rule" stating that:

> Where a drug manufacturer recommends to the medical profession (1) the conditions under which its drug should be prescribed; (2) the disorders it is designed to relieve; (3) the precautionary measures which should be observed; and (4) warns of the dangers which are inherent in its use, a doctor's deviation from such recommendations is prima facie evidence of negligence if there is competent medical testimony that his patient's injury or death resulted from the doctor's failure to adhere to

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249. *Id.* at 233, 723 N.E.2d at 545, 701 N.Y.S.2d at 690.
250. *Id.* at 235, 723 N.E.2d at 546, 701 N.Y.S.2d at 691.
251. *Id.* at 234-35, 723 N.E.2d at 546, 701 N.Y.S.2d at 691.
252. *Id.* at 235, 723 N.E.2d at 547, 701 N.Y.S.2d at 691.
253. 94 N.Y.2d at 235, 723 N.E.2d at 547, 701 N.Y.S.2d at 691.
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* at 236, 723 N.E.2d at 547, 701 N.Y.S.2d at 692.
258. *Id.* at 237, 723 N.E.2d at 547, 701 N.Y.S.2d at 692.
259. Armstrong v. State of New York, 214 A.D.2d 812, 625 N.Y.S.2d 317 (3d Dep't 1995); Gatto v. Cooper, 201 A.D.2d 455, 607 N.Y.S.2d 372 (2d Dep't 1994); Paul v. Boschenstein, 105 A.D.2d 248, 482 N.Y.S.2d 870 (2d Dep't 1984).

the recommendations.[260]

Nevertheless, the Court of Appeals rejected this approach.[261] More specifically, it reasoned that the admission of the PDR alone in place of expert testimony would result in a standard of care established by drug manufacturers instead of the medical profession.[262] The Court stated its position in this way:

> [W]e reject the contention that the PDR constitutes prima facie evidence of a standard of care. The PDR may have some significance in identifying a doctor's standard of care in the administration and use of prescription drugs, but is not the sole determinant. In our view, the information contained in the PDR can only be analyzed in the context of the medical condition of the patient. The testimony of an expert is necessary to interpret whether the drug in question presented an unacceptable risk for the patient in either its administration or the monitoring of its use.[263]

Even in New York, there remains a way to put the relevant parts of the PDR and drug package inserts before the jury. An expert may state an opinion derived in part from professionally reliable sources even if these sources are not part of the record.[264] Therefore, plaintiff's expert in a malpractice case could certainly rely upon relevant excerpts from the PDR and package inserts in arriving at an opinion that defendants had deviated from the medical standard.[265] Presumably, the content of the writings which support the opinion could be revealed, not for their truth, but to explain the basis for the expert's opinion. The Court in *Spensieri* appeared to acknowledge this point when it explained that:

> In this case plaintiff's expert testified that in his opinion the PDR represented the standard of care for physicians in the use and administration of prescription drugs in 1986. In addition, he described the risks of prescribing the drugs in question in light of plaintiff's medical condition. Thus, plaintiff was not prohibited from offering testimony concerning her expert's professional evaluation of defendants'

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260. 94 N.Y.2d at 237-38, 723 N.E.2d at 547-48, 701 N.Y.S.2d at 691-92 (quoting Mulder v. Parke Davis & Co., 181 N.W.2d 882, 887 (Minn. 1970).

261. *Spensieri*, 94 N.Y.2d at 239, 723 N.E.2d at 548, 701 N.Y.S.2d at 693.

262. *Id.* at 238, 723 N.E.2d at 548, 701 N.Y.S.2d at 693.

263. *Id.* at 239, 723 N.E.2d at 548, 701 N.Y.S.2d at 693.

264. People v. Sugden, 35 N.Y.2d 453, 323 N.E.2d 169, 363 N.Y.S.2d 923 (1974); MARTIN ET AL., *supra* note 8, at § 7.3.3.

265. Even though the PDR and package inserts were not received in evidence, their reliability was established by the testimony of plaintiff's medical expert who characterized the material as authoritative. *Spensieri*, 94 N.Y.2d at 235, 723 N.E.2d at 546, 701 N.Y.S.2d at 691.

> conduct based, in part, on reliance on the PDR. Plaintiff was barred only from offering the contents of the PDR as stand alone proof of the standard of care.[266]

As has been pointed out, Federal law, unlike New York, provides a hearsay exception for "learned treatises."[267] Federal Rule of Evidence 803(18) defines this exception in part with these words: "statements contained in *published treatises, periodicals, or pamphlets*" may be admissible if established as reliable authority. The novel question presented in *Costantino v. Herzog* was whether a videotape could qualify under this language as a learned treatise.[268] The Second Circuit said yes.[269]

In this case, the defendant doctor was an obstetrician who delivered Amanda Costantino.[270] During delivery, baby Amanda's shoulder became trapped behind her mother's pubic bone, a condition known as "shoulder dystocia."[271] Defendant attempted various maneuvers to remedy this situation and finally delivered Amanda.[272] Unfortunately, she was born with "Erb's Palsy," a nerve impairment.[273] The Costantinos filed a malpractice action alleging that by pulling and rotating Amanda's head during the delivery, defendant caused the injury.[274] Plaintiff's expert so testified.[275] The defense maintained that manipulation of the head was one of the most popular techniques used to remedy shoulder dystocia.[276] In support of his position, defendant offered in evidence a 15-minute videotape from the audiovisual library of the American College of Obstetricians and Gynecologists.[277] This videotape was titled "Shoulder Dystocia" and was produced and disseminated by the college to educate physicians.[278] It portrayed the various techniques recommended to remedy shoulder dystocia.[279]

The video was obviously hearsay but was offered under the federal

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266. 94 N.Y.2d at 239, 723 N.E.2d at 548-49, 701 N.Y.S.2d at 693-94 (citation omitted).
267. FED. R. EVID. 803 (18); MARTIN ET AL., *supra* note 8, at § 8.3.3.18.
268. 203 F.3d 164 (2d Cir. 2000).
269. *Id.*
270. *Id.* at 167.
271. *Id.*
272. *Id.*
273. 203 F.3d at 167.
274. *Id.* at 168.
275. *Id.*
276. *Id.*
277. *Id.*
278. 203 F.3d at 168.
279. *Id.*

learned treatise exception.[280] The problem is that Rule 803(18) speaks only of "*published treatises, periodicals* or *pamphlets*."[281] Moreover, the Rule goes on to state that relevant statements under this exception if admitted, "may be *read* into evidence but may not be received as exhibits."[282] The trial judge admitted the video stating that "the distinction between . . . a periodical or a book, as opposed to a videotape, is just overly artificial."[283] The video was played twice during the trial; once in cross-examination of plaintiff's expert and once again during the direct examination of defendant's expert.[284] After judgment for defendant, plaintiffs appealed to the Second Circuit arguing that admission of the videotape constituted an improper rewriting of Federal Rule 803(18).[285]

The Second Circuit panel affirmed.[286] It acknowledged that what limited authority existed, was in state courts.[287] It also acknowledged that at least one such decision refused to recognize videotapes as learned treatises because "adding videotapes to the list of materials would constitute judicial legislation."[288] But the panel responded by saying that here "we are compelled to make law."[289] It agreed with the trial judge that:

> it is just "overly artificial" to say that information that is sufficiently trustworthy to overcome the hearsay bar when presented in a printed learned treatise loses the badge of trustworthiness when presented in a videotape. We see no reason to deprive a jury of authoritative learning simply because it is presented in a visual, rather than printed, format. In this age of visual communication a videotape may often be the most helpful way to illuminate the truth . . . .[290]

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280. FED. R. EVID 803(18).
281. *Id.*
282. *Id.*
283. 203 F.3d at 168.
284. *Id.* at 169.
285. *Id.* at 170.
286. *Id.* at 171.
287. *Id.* *Compare* Simmons v. Yurchak, 551 N.E.2d 539 (Mass. App. Ct. 1990) (affirming the trial court's refusal to recognize videotapes as learned treatises) *with* Loven v. State, 831 S.W.2d 387, 397 (Tex. App. 1992) ("Videotapes are nothing more than a contemporary variant of a published treatise.").
288. *Costantino*, 203 F.3d at 171.
289. *Id.*
290. *Id.*

III. WITNESSES

A. Summation Comments on Witness Testimony

This *Survey* period produced two significant decisions involving the boundaries of permissible prosecutorial comment on witness testimony. One is the United States Supreme Court decision in *Portuondo v. Agard*.[291] The other is the New York Court of Appeals decision in *People v. Alexander*.[292]

Portuondo v. Agard raises the question of whether prosecutorial comment is permissible if it calls attention to defendant's opportunity to shade his testimony by virtue of his courtroom presence during the testimony of other witnesses.[293]

In order to discourage collusion or the tailoring of testimony among witnesses, the trial judge may exclude them from the courtroom during the testimony of other witnesses.[294] In these situations the witness is said to be "sequestered" or "under the rule."[295] In New York, sequestration is within the discretion of the trial judge.[296] In federal courts it is a matter of right on request of one of the parties.[297] Even so, parties may never be excluded from the courtroom.[298] In particular, to exclude an accused in a criminal case would be a denial of defendant's constitutional rights to present a defense, to confront witnesses and to the effective assistance of counsel.[299] That being the case, may the People explain to the jury the unique advantage this gives to the accused.

In *Portuondo v. Agard*, the defendant was convicted in New York State court of sodomy and weapons possession.[300] At the trial, the District Attorney explained that, unlike other witnesses, the defendant was entitled to be present to hear all the testimony before taking the stand.[301] In her closing argument, the District Attorney stated:

You know, ladies and gentlemen, unlike all the other witnesses in this

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291. 120 S. Ct. 1119 (2000).
292. 94 N.Y.2d 382, 727 N.E.2d 109, 705 N.Y.S.2d 551 (1999).
293. 120 S. Ct. at 1120.
294. People v. Cooke, 292 N.Y. 185, 190-91, 54 N.E.2d 357, 360 (1944).
295. MARTIN ET AL., *supra* note 8, at § 6.15.; FED. R. EVID. 615; *Cooke*, 292 N.Y. at 191, 54 N.E.2d at 360.
296. *Cooke*, 292 N.Y. at 191, 54 N.E.2d at 360.
297. "At the request of a party the court *shall* order witnesses excluded so that they cannot hear the testimony of other witnesses." FED. R. EVID. 615 (emphasis added).
298. People v. Dokes, 79 N.Y.2d 656, 595 N.E.2d 836, 584 N.Y.S.2d 761 (1992).
299. *Id.* at 659-60, 595 N.E.2d at 838-39, 584 N.Y.S.2d at 763-64.
300. 120 S. Ct. at 1122.
301. *Id.*

> case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all other witnesses before he testifies .... That gives you a big advantage, doesn't it? You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit into the evidence? . . . He's a smart man. I never said he was stupid . . . He used everything to his advantage.[302]

Following his conviction and unsuccessful state court appeals, Agard petitioned the federal court for relief.[303] He argued that the prosecutor's comments penalized him for exercising his Sixth Amendment right to attend his own trial and to confront the witnesses against him.[304] He likened his situation to the facts in *Griffin v. California*.[305] In that case, the United States Supreme Court held that prosecutors may not comment on a defendant's silence at trial because it would penalize the decision not to testify which is protected by the Fifth Amendment.[306]

As reported in the 1998 *Survey*, the Second Circuit reversed Agard's conviction and held that the prosecutor's summation violated several of the defendant's constitutional rights.[307] The Federal Court of Appeals panel stated its view that:

> it is constitutional error for a prosecutor to insinuate to the jury for the first time during summation that the defendant's presence in the courtroom at trial provided him with a unique opportunity to tailor his testimony to match the evidence. Such comments violate a criminal defendant's right to confrontation, his right to testify on his own behalf, and his right to receive due process and a fair trial.[308]

In *Portuondo v. Agard*, the United States Supreme Court reversed the Second Circuit in a 7 to 2 vote and held that the prosecutor's comments did not rise to the level of constitutional error.[309] Calling *Griffin v. California* a "poor analogue," Justice Scalia reasoned that a prosecutor's comment alerting the jury that defendant's presence at trial allows the opportunity to tailor testimony is constitutionally harmless.[310] It is simply appropriate comment on witness credibility.[311] *Griffin* prohibits telling the jury to do

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302. *Id.*
303. *Id.*
304. *Id.*
305. 380 U.S. 609 (1965).
306. *Id.* at 614.
307. Agard v. Portuondo, 117 F.3d 696, 708 (2d Cir. 1997).
308. 117 F.3d at 709.
309. 120 S. Ct. at 1128.
310. *Id.* at 1124.
311. *Id.*

what it can not do; equate silence with guilt.[312] But here, the majority argues, the jury is being told to do what it can and should do; consider the motives and interest of a testifying witness.[313] Thus, the prosecutor's comment was said to be "appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth."[314] In a strongly worded dissent, Justices Ginsburg and Souter charged the majority with having transformed a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility.[315]

There are several aspects of this decision that should concern the criminal defense bar. First, the prosecutor's comment in *Agard* was allowed even though the trial evidence did not provide any specific indication of tailoring.[316] Second, because the prosecutor never raised the suggestion of tailoring in cross-examination of defendant or at any other time, her final summation comment left the defense no opportunity to respond.[317] The dissent explored this factor by pointing out that:

> a generic tailoring argument launched on summation entails the simple unfairness of preventing a defendant from answering the charge. This problem was especially pronounced in the instant case. Under New York law, defendants generally may not bolster their own credibility by introducing their prior consistent statements but may introduce such statements to rebut claims of recent fabrication. Had the prosecution made its tailoring accusations on cross-examination, Agard might have been able to prove that his story at trial was the same as it had been before he heard the testimony of other witnesses. A prosecutor who can withhold a tailoring accusation until summation can avert such a rebuttal.[318]

Now that an *Agard* generic tailoring comment has been held constitutionally valid, one might expect District Attorneys in New York to incorporate it as a standard part of their summations in any case that involves a testifying defendant. Such action may be premature. As the concurring opinion pointed out, the court's conclusion is that the *Agard* summation survives constitutional scrutiny.[319] It "does not, of course,

312. *Id.*
313. *Id.*
314. 120 S. Ct. at 1127.
315. *Id.* at 1129.
316. *Id.* at 1126.
317. *Id.* at 1126.
318. *Id.* at 1131 (Ginsburg, J., dissenting) (internal citations omitted).
319. Justices Stevens and Breyer concurred in the majority opinion but only because they were "not persuaded that the prosecutor's summation crossed the high threshold that

deprive states or trial judges of the power to prevent such argument entirely or to provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial."[320]

New York state courts have not authoritatively passed on the *Agard* question. It is, therefore, open to defense counsel to argue that the generic tailoring summation given without prior notice or foundation violates the state constitution or that, as a matter of non-constitutional state law, is an improper prosecutorial practice. The New York Court of Appeals decision in *People v. Alexander*, discussed more elaborately, *infra*, provides support for the defense position.[321] The Court in *Alexander* criticized the prosecution for arguing a credibility inference that had no support in the record and for raising it for the first time on summation when the defense had no time to respond.[322] In any event, the criminal defense bar should anticipate the *Agard* summation. It has been suggested that the defendant's wisest course may be to seek an *in limine* ruling in advance of trial to prevent the unfair and unsupported prosecutorial use of generic tailoring arguments.[323]

During the *Survey* period, the New York Court of Appeals also spoke to the appropriateness of prosecutorial comment on witness testimony. In *People v. Alexander*, the defendant asserted a misidentification defense arising out of a shooting incident.[324] At the trial, an African-American witness, one, Washington, identified defendant, also an African-American male, as the one that he saw at the scene holding a handgun.[325] The defendant testified that he had no gun and had not fired any shots.[326] He explained that he was present at the scene, standing near someone else who had the gun.[327] Several other witnesses supported defendant's account. On summation, the Assistant District Attorney argued to the jury that

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separates trial error—even serious trial error—from the kind of fundamental unfairness for which the Constitution requires that a state criminal conviction be set aside." *Id.* at 1128-29 (Stevens, J. concurring). Thus, while upholding the constitutionality of the prosecutor's comments, these justices still condemned them by saying that the prosecutor's actions demeaned the truth-seeking function of the adversary process. *Id.* at 1129 (Stevens, J., concurring).

320. *Id.* (Stevens, J., concurring).

321. *See infra* notes 325-33 and accompanying text.

322. 94 N.Y.2d at 382, 727 N.E.2d at 109, 705 N.Y.S.2d at 551.

323. For a thoughtful discussion of the likely effect of Portuondo v. Agard in New York, see B. Holland, *Supreme Court Raises Strategic Issues for Defense*, N.Y.L.J., Mar. 30, 2000, at 1.

324. 94 N.Y.2d at 383, 727 N.E.2d at 109, 705 N.Y.S.2d at 551.

325. *Id.* at 383-84, 727 N.E.2d at 109-10, 705 N.Y.S.2d at 551-52.

326. *Id.*

327. *Id.*

Washington's identification implicating the defendant was "more reliable" because both Washington and defendant were African-American.[328] The prosecutor stated in closing:

> A good strong identification; if you will, ladies and gentlemen, an intra-racial identification .... I submit to you inherently more reliable, intra-racial, white on white, Asian on Asian, Afro-American on Afro-American as this one is here; a good strong identification more reliable.[329]

The Court found error in allowing this argument for the first time in summation, when the prosecution had no evidentiary support for the bolstering inference.[330] The Court reversed defendant's weapons possession conviction.[331] It explained that:

> the issue of race-based identification formed no part of the record in this case. By raising it for the first time during closing argument, the prosecutor had the sole, final, inapt word on the subject. Moreover, the error was compounded by the court's failure to give a curative instruction or otherwise rectify the situation. Instead, it overruled the objection, and thus allowed the prosecutor to vouch improperly for the credibility of the witness by arguing that intraracial identifications are "more reliable."[332]

B. Credibility Impeachment: Appellate Review and Waiver

An issue that has gained prominence, especially in federal courts, is presented by this scenario. Assume that a party in a civil or a criminal case intends to testify at trial. The testifying party has a prior conviction which his opponent is certain to bring up in cross-examination to impeach credibility. In advance of trial, the party moves *in limine* to exclude evidence of the prior conviction.[333] The trial judge, perhaps erroneously, denies the motion and rules that the prior conviction is admissible to impeach.[334] At trial, the party does testify.[335] But instead of waiting for his opponent's cross-examination to reveal the conviction, the testifying party admits to the crime on direct examination. As a matter of trial tactics, this

328. *Id.* at 384, 727 N.E.2d at 110, 705 N.Y.S.2d at 552.
329. 94 N.Y.2d at 384, 727 N.E.2d at 110, 705 N.Y.S.2d at 552.
330. *Id.* at 385, 727 N.E.2d at 110-11, 705 N.Y.S.2d at 552.
331. *Id.*
332. *Id.*
333. FED. R. EVID. 609.
334. *Id.*
335. *Id.*

is a well-advised customary procedure.[336] It even has a name. It is called "pulling the teeth of the cross-examiner."[337] If the testifier does not admit to the conviction on direct examination, the impeaching opponent gets the benefit of dramatic surprise on cross-examination. The jury may conclude that the witness was trying to hide negative facts. Therefore, the almost universal advice of the trial bar is to face up to the problem even to the point of perhaps admitting the conviction on opening statement; if not that early, then certainly upon direct examination. But then a serious question arises: Has the issue of admissibility been preserved for appellate review? On this question there is confusion. A number of federal decisions hold that if the testifying party takes the initiative and brings up the impeaching facts in opening statement or on direct examination, the party waives the right to object on appeal to the adverse *in limine* ruling.[338]

The United States Supreme Court has agreed to decide this question by granting certiorari in the case of *United States v. Ohler*.[339] The facts in *Ohler* present clearly the testifying party's dilemma. Ohler was charged with importing and distributing marijuana.[340] The government moved *in limine* that defendant's prior conviction for possession of methamphetamine be ruled admissible at trial.[341] The district court decided that the prior conviction would be admissible to impeach credibility if defendant testified.[342] Ohler did testify and during her direct examination

336. FED. R. EVID. 609 was amended in 1990 to remove the limitation that a defendant's prior conviction could only be elicited during cross-examination. The change now permits the raising of the conviction during defendant's direct examination. The reason for the change was the realization that defendants often desire to deal with negative facts in advance of their being brought out by the opposition. United States v. Ohler, 169 F.3d 1200, 1202 (9th Cir. 1999).

337. It is sometimes called "removing the sting." *See* United States v. Ohler, 169 F.3d at 1202 (quoting the Advisory Committee Note to the Amendment to FED. R. EVID. 609. ("It is common for witnesses to reveal on direct examination their convictions to 'remove the sting' of impeachment.)).

338. *Ohler*, 169 F.3d 1200; Gill v. Thomas, 83 F.3d 537, 541 (1st Cir. 1996) ("By offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal."). *But see* Wilson v. Williams, 182 F.3d 562, 566 (7th Cir. 1999) (*en banc*) ("[Plaintiff] did not surrender his objection by making the best he could of his situation after the judge's adverse ruling."), United States v. Fisher, 106 F.3d 622 (5th Cir. 1997) and Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997) (An *in limine* objection is sufficient to preserve the issue on appeal when movant, as a matter of trial strategy, presents the objectionable evidence himself on direct examination in order to minimize its prejudicial effect.).

339. Ohler v. United States, 120 S. Ct. 370 (1999).

340. *Ohler*, 169 F.3d at 1201.

341. *Id.*

342. *Id.*

she admitted her prior conviction.[343] The government pursued the matter further on cross-examination.[344] On appeal Ohler argued that the trial court had erred in finding the methamphetamine conviction admissible.[345] The Court of Appeals held that Ohler had forfeited her right to raise the issue by introducing the conviction herself.[346] The appellate court recognized that introduction by a witness herself, on her direct, of a prior conviction is a common trial tactic recommended by text writers on trial practice.[347] Nevertheless, it held that a criminal defendant waives the right to appeal an *in limine* ruling that a prior conviction is admissible whenever the defendant introduces evidence of her prior conviction during her direct examination.[348]

The Supreme Court will decide this issue during its current term. Its decision will be reported in next year's *Survey*. The realities of trial practice and fairness to the testifying party suggest that the forfeiture decision in *Ohler* should be overturned.[349]

C. Written Witness Statements in Lieu of Direct Examination

In complex federal civil cases, the use of written testimony in lieu of oral direct examination "is an accepted and encouraged technique for shortening bench trials."[350] In the Southern District of New York, for example, federal judges regularly use affidavits in these situations.[351] This is true even though such written statements technically may violate the rule against hearsay and even though there is no explicit authorization for such a procedure in the Federal Rules of Civil Procedure or in the Federal Rules of Evidence.[352]

May New York State courts follow a similar practice? At least one court says yes. *Campaign for Fiscal Equity v. State of New York* is a citizen group challenge to the equity of the state's funding of New York

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343. *Id.*
344. *Id.*
345. 169 F.3d at 1202.
346. *Id.* at 1204.
347. *Id.* at 1202, 1204.
348. *Id.* at 1204.
349. *See* Daniel J.. Capra, *Certiorari in "Removing the Sting" Case*, N.Y.L.J., Nov. 12, 1999, at 1.
350. Phonetele v. American Tel. & Tel. Co., 889 F.2d 224, 232 (9th Cir. 1989).
351. Simon & Schuster v. Dove Audio, 970 F. Supp. 279, 283 n.1 (S.D.N.Y. 1997); Strehle v. United States, 860 F. Supp. 136, 138 (S.D.N.Y. 1994); *see also* cases listed in Campaign for Fiscal Equity v. State of New York, 182 Misc. 2d 676, 678, 699 N.Y.S.2d 663, 664 (Sup. Ct., N.Y. Co. 1999).
352. *See* FED. R. CIV. P.; FED. R. EVID.

City schools.[353] After six weeks of testimony in this non-jury case, plaintiffs estimated that they needed to call as many as 140 more non-expert witnesses.[354] Plaintiffs requested permission to use affidavits to present direct testimony arguing that it would help ensure that direct testimony would be succinct.[355] Defendants objected "on the ground that it would allow plaintiffs' counsel to 'craft' testimony."[356]

In what appears to be the first New York opinion approving this affidavit procedure, the court granted plaintiffs' request.[357] Specifically, the court laid out the parameters of its ruling in this fashion:

> The parties shall have the right to submit the direct testimony of non-expert witnesses via affidavit, affidavit supplemented by live testimony, or solely by live testimony. If a witness's direct testimony shall be presented in whole or in part by affidavit, the affidavit shall be presented to the opposing party and to the court at least three business days prior to the appearance of the witness. The party offering the affidavit shall specify if the affidavit comprises the whole or a part of the witness's direct testimony. The affidavits shall consist of numbered paragraphs to assist the opposing party to make objections (if necessary) to portions of the affidavit. The facts stated shall be in narrative, as opposed to question and answer, form.[358]

Authority for this approach was found in New York CPLR 4011 which empowers the court "[to] regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum."[359] As for defendant's fear of "crafted testimony," the court pointed out that the authors of the affidavits will be present in court and subject to a full and searching cross-examination.[360] Indeed, the defendants in one sense will be benefited by the use of affidavits since "they will know chapter and verse of a witness's testimony three business days prior to its introduction."[361] This advantage should help make cross-examination more effective, better organized and perhaps shorter than it would otherwise be.[362]

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353. 182 Misc. 2d at 676, 699 N.Y.S.2d at 663.
354. *Id.* at 677, 699 N.Y.S.2d at 663-64.
355. *Id.* at 677, 699 N.Y.S.2d at 663.
356. *Id.* at 677, 699 N.Y.S.2d at 664.
357. *Id.* at 679, 699 N.Y.S.2d at 665.
358. 182 Misc. 2d at 679, 699 N.Y.S.2d at 655.
359. *Id.* at 678, 699 N.Y.S.2d at 664 (citing N.Y. C.P.L.R. 4011 (McKinney 1992)).
360. *Id.* at 679, 699 N.Y.S.2d at 665.
361. *Id.*
362. *Id.*

IV. PRIVILEGES

A. Federal Journalist Privilege

In a series of decisions, the Second Circuit has recognized a qualified privilege protecting the confidential sources of a journalist.[363] In order to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: (1) highly material and relevant, (2) necessary or critical to the maintenance of the claim, and (3) not obtainable from other available sources.[364]

Does this qualified privilege extend to protect *non-confidential* information? Last year's *Survey* reported that in *Gonzales v. National Broadcasting Co., Inc.*, the Second Circuit held that there was no journalist privilege under federal law to protect non-confidential sources or data.[365] In a surprising turnabout, the Court has reconsidered.[366] On a rehearing of the same case, it announced that it was wrong on the law and reversed itself by finding a qualified privilege for non-confidential press information.[367] It went on to explain, however, that the showing needed to overcome the journalists' privilege is less demanding than for material acquired in confidence.[368]

Albert and Mary Gonzales brought a civil rights action against Pierce, a Louisiana Deputy Sheriff claiming that the deputy stopped their vehicle and detained them without cause because they were Hispanic.[369] Plaintiffs further alleged "it was Deputy Pierce's practice to stop travelers without probable cause or reasonable suspicion in order to extort valuable property from them, and to detain and question 'minority citizens, including Hispanics,' longer than similarly situated Caucasians."[370] Subsequently, NBC aired a segment on its "Dateline" television program reporting on what it described as "pervasive abuses by law enforcement officers in Louisiana who conduct unwarranted stops of motorists, particularly of out-

363. Gonzales v. National Broad. Co., 194 F.3d 29, 32-33 (2d Cir. 1999); *In re* Petroleum Prods. Antitrust Litig., 680 F.2d 5 (2d Cir. 1982); Baker v. F. & F. Inv., 470 F.2d 778, 785 (2d Cir. 1972).

364. *In re* Petroleum Prods., 680 F.2d at 7.

365. 155 F.3d 618, 626 (2d Cir. 1998).

366. *Gonzales*, 194 F.3d at 29, 30.

367. *Id.*

368. *Id.* at 35-36.

369. *Id.* at 30-31.

370. *Id.* at 31.

of-state travelers."[371] According to the report, these stops often lead to harassment and seizure of property.[372] The report included a videotaped stop of one of its employees, an NBC producer, by Deputy Pierce.[373] The NBC employee rented a car, equipped it with hidden cameras, and traveled incognito on Louisiana roadways to investigate allegations of malfeasance by Louisiana highway patrolmen.[374] The Dateline report asserted that "footage recorded by hidden cameras demonstrated that no traffic laws had been violated, and that the car had been stopped without probable cause."[375] The actual video images broadcast in the report, however, showed only a few brief clips of the car in motion, as well as footage of Deputy Pierce pulling over the vehicle and examining the currency compartment of a passenger's wallet.[376] Thereafter, the Gonzales served NBC with a subpoena "seeking the original, unedited camera footage of Deputy Pierce's stop of Weiland, as well as deposition testimony from NBC representatives about the events recorded on the videotape."[377] Approximately one month later, Deputy Pierce served NBC with a similar subpoena.[378] NBC objected to both subpoenas in part on the grounds that they sought materials protected from disclosure by the qualified privilege for journalists.[379]

In its latest decision, the Second Circuit modified its original opinion and concluded in *Gonzales* that the journalist privilege did apply but that the showing necessary to overcome it had been made.[380] Therefore, NBC was required to disclose.[381]

The Court justified its extension of the privilege to non-confidential information by pointing out policy concerns such as "the pivotal function of reporters to collect information for public dissemination"[382] and the "paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters."[383]

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371. *Id.* at 31.
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.* at 32.
381. *Id.*
382. *Id.* at 35 (quoting *Petroleum Prod.*, 680 F.2d at 8).
383. *Id.* (quoting *Baker*, 470 F.2d at 782).

The Court explained that these concerns apply even when the information sought from the press is not confidential.[384] Otherwise, said the Court:

> If parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties—particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation. Incentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas. And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.[385]

The Court went on, however, to recognize that "where the protection of confidential sources is not involved, the nature of the press interest protected by the privilege is narrower."[386] For non-confidential materials, the showing needed to overcome the privilege is less demanding.

> Where a civil litigant seeks non-confidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists' privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.[387]

On the record before it the Court of Appeals agreed with the lower court that the parties who subpoenaed the tapes had satisfied the test to overcome the privilege.[388]

B. Public Interest Privilege

The New York Court of Appeals has clarified the dimensions of the public interest privilege for "official confidential information in the care

384. *Id.*
385. *Id.*
386. *Id.* at 36.
387. *Id.*
388. *Id.*

and custody of governmental entities."[389] *In Re World Trade Center Bombing Litigation* defines the privilege as covering "confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged."[390] The justification for the privilege is that the public interest might be harmed if sensitive material were disclosed.[391] The privilege is a qualified one.[392] It requires that the public agency claiming the privilege demonstrate the specific public interest that would be jeopardized by discovery.[393] This interest, in turn, would be weighed against the need for disclosure.[394] Thus, "whether the privilege attaches in a particular setting is a fact-specific determination for a fact-discretion weighing court, operating in camera, if necessary."[395]

In Re World Trade Center Bombing Litigation involved a suit by plaintiffs who suffered injury in the terrorist bombing of the World Trade Center.[396] It was brought against the Port Authority of New York and New Jersey in its capacity as owner of the building.[397] Plaintiffs sought discovery of certain documents in possession of the Port Authority relating to security at the Center and anti-terrorism measures.[398] Included among these documents was a report done eight years before the bombing which analyzed vulnerabilities in the anti-terrorist security systems at the World Trade Center.[399] Over objection of the Port Authority that the public interest privilege applied, the lower court ordered production of some of these documents.[400] On appeal, the appellate division held that the public interest privilege was not available to the Port Authority as a matter of law because the Authority was being sued in its private capacity as building

389. In re World Trade Ctr. Bombing Litig., 93 N.Y.2d 1, 8, 709 N.E.2d 452, 455, 686 N.Y.S.2d 743, 747 (1999). The privilege was described in Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113, 117, 316 N.E.2d 301, 303, 359 N.Y.S.2d 1, 4 (1974).

390. 93 N.Y.2d at 8, 709 N.E.2d at 456, 686 N.Y.S.2d at 747.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.* at 8-9, 709 N.E.2d at 456, 686 N.Y.S.2d at 747.

395. *In re World Trade Ctr. Bombing Litig.*, 93 N.Y.2d at 8, 709 N.E.2d at 456, 686 N.Y.S.2d at 747.

396. *Id.* at 4, 709 N.E.2d 452, 453, 686 N.Y.S.2d 743, 744 (1999).

397. *Id.* at 4-5, 709 N.E.2d at 453-54, 686 N.Y.S.2d at 744.

398. *Id.* at 4, 709 N.E.2d at 453, 686 N.Y.S.2d at 744.

399. *Id.* at 6-7, 709 N.E.2d at 454, 686 N.Y.S.2d at 746.

400. *In re World Trade Ctr. Bombing Litig*, 93 N.Y.2d at 7, 709 N.E.2d at 455, 686 N.Y.S.2d at 746.

owner.[401] The Court of Appeals disagreed.[402] It held that the public interest privilege was not precluded as a matter of law and remanded the case for the balancing of interests that would be required to determine availability of the privilege.[403]

In the course of its opinion the Court noted the nature of the public interests that might be harmed by disclosure.[404] These included the possibility that

> (1) the documents, or some of their parts, contain confidential information concerning safety or security systems, methods, devices, practices or vulnerabilities, the disclosure of which would endanger lives and property and adversely affect security at the WTC; (2) the disclosure would inhibit candor among persons engaged in efforts undertaken by government agencies to promote public safety; and (3) the disclosure would reveal confidential information regarding criminal activity obtained from law enforcement agencies under a pledge of confidentiality.[405]

On remand, the trial court, after a fact-based balancing, required production of some security related documents.[406] Again, the Port Authority appealed arguing that the scope of the ordered disclosure violated its public interest privilege.[407] In the latest decision, the First Department upheld the disclosure.[408]

The appellate division noted that the competing interests were the Port Authority's interest in maintaining public safety at the World Trade Center and the plaintiffs' interest in advancing their claims that the Port Authority either negligently or recklessly ignored a stated potential risk or misrepresented the quality and nature of security at the World Trade Center to prospective tenants.[409] Taking its cue from the Court of Appeals, the Port Authority argued that the public interest privilege protects these documents because their disclosure would be useful to persons seeking to cause injury to persons and property at the World Trade Center and because their disclosure would inhibit candor in security analysis in the

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401. *Id.* at 7-8, 709 N.E.2d at 455, 686 N.Y.S.2d at 746.
402. *Id.* at 8, 709 N.E.2d at 456-57, 686 N.Y.S.2d at 747-48.
403. *Id.* at 12-13, 709 N.E.2d at 458, 686 N.Y.S.2d at 749.
404. *Id.* at 10, 709 N.E.2d at 457, 686 N.Y.S.2d at 749.
405. *In re World Trade Ctr. Bombing Litig.*, 93 N.Y.2d at 10, 709 N.E.2d at 457, 686 N.Y.S.2d at 749.
406. *In re World Trade Ctr. Bombing Litig.*, 263 A.D.2d 417, 693 N.Y.S.2d 586 (1st Dep't 1999).
407. *Id.* at 421, 693 N.Y.S.2d at 589.
408. *Id.* at 424, 692 N.Y.S.2d at 592.
409. *Id.* at 420, 693 N.Y.S.2d at 589.

future.[410] But the Court gave these factors little weight.

As to the first interest, that the information would be exploited by terrorists, the appellate division pointed out that the information was already well-known to the public and had been the subject of public proceedings and extensive media coverage.[411] The second concern, that candor would be inhibited in future security reports, was also rejected.[412] If the reports sought involved an analysis or criticism of past behavior their disclosure might lead investigators doing future reports to try to hide misfeasance.[413] But the security analyses at issue in this case were performed before the World Trade Center bombing and before any potential liability had arisen.[414] Their goal was not to analyze prior mistakes but to recommend future action.[415] In this situation, the motive to hide the truth in the future as a side effect of disclosure is far less likely.[416] The appellate division concluded that the potential of future disclosure of such documents would most likely motivate improved rather than impaired, performance in their preparation.[417] The First Department also found that plaintiffs have shown that the "documents are crucial to the prosecution of their claim, which is directly related to the Port Authority's alleged prior awareness of deficiencies in its security system and its alleged failure to address them."[418]

V. RELEVANCE

A. Rape Shield Statute

In a highly significant decision, the Appellate Division, First Department, substantially curtailed the scope of New York's Rape Shield Statute. In *People v. Jovanovic*, the Court by a 3-to-1 margin reversed the defendant's convictions for kidnapping, sexual abuse and assault because the trial court's evidentiary rulings incorrectly applied the shield statute and, as a result, improperly hampered defendant's ability to present a defense.[419] The opinion of the Court stands for now as a leading

410. *Id.* at 421, 693 N.Y.S.2d at 589-90.
411. *In re World Trade Ctr. Bombing Litig.*, 263 A.D.2d at 421-22, 693 N.Y.S.2d at 589-90.
412. *Id.* at 423-24, 693 N.Y.S.2d at 591.
413. *Id.* at 424-25, 693 N.Y.S.2d at 592.
414. *Id.*
415. *Id.*
416. 263 A.D.2d at 424-25, 693 N.Y.S.2d at 592.
417. *Id.* at 425, 693 N.Y.S.2d at 592.
418. *Id.*
419. 263 A.D.2d 182, 183, 700 N.Y.S.2d 156, 159 (1st Dep't 1999).

interpretation of New York Criminal Procedure Section 60.42.[420]

People v. Jovanovic involved the notorious cyber-sex, sadomasochistic abuse conviction of a Columbia University graduate student for victimizing a Barnard College student.[421] Over the course of about four months, Jovanovic and complainant carried on continuous on-line e-mail conversations.[422] Some of this electronic correspondence involved statements in which complainant expressed her interest and prior participation in sadomasochism.[423] Following these Internet exchanges, the parties met.[424] According to complainant's testimony at trial, she agreed to go to Jovanovic's apartment where he kept her captive and tortured her for 20 hours.[425] The accused asserted that the activities were consensual and that much of the detail provided by complainant was exaggerated or untrue.[426] The trial judge precluded the defense from introducing the complainant's e-mail messages that concerned her desire for, and experience in, participating in violent sex.[427] Included in the excluded e-mails were complainant's statements to Jovanovic that she was a

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420. The New York Rape Shield Statute is set forth in N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2000) and provides in pertinent part:

> Evidence of a victim's sexual conduct shall not be admissible in a prosecution for [a sex] offense or an attempt to commit [a sex] offense . . . unless such evidence:
> 1. proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or
> 2. proves or tends to prove that the victim has been convicted of [prostitution] . . . within three years prior to the sex offense which is the subject of the prosecution; or
> 3. rebuts evidence introduced by the people of the victim's failure to engage in sexual intercourse, deviate sexual intercourse or sexual contact during a given period of time; or
> 4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or
> 5. is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

421. 263 A.D.2d at 183-84, 700 N.Y.S.2d at 159-60.

422. *Id.* at 183-86, 700 N.Y.S.2d at 159-61.

423. *Id.*

424. *Id.* at 185-88, 700 N.Y.S.2d at 161-62.

425. *Id.* at 187-88, 700 N.Y.S.2d at 162.

426. 263 A.D.2d at 201-02, 700 N.Y.S.2d at 171.

427. *Id.* at 189-91, 700 N.Y.S.2d at 163-64. The trial court excluded portions of four e-mail messages from complainant to defendant on the ground that they constituted evidence of complainant's prior sexual conduct, having the effect of demonstrating her "unchastity" and that therefore, the messages were protected by the statute. *Id.* at 191-90, 700 N.Y.S.2d at 164.

sadomasochist and enjoyed telling people about it; that she had been hurt in such activity by her boyfriend, one Luke; that she was known in a club catering to sadomasochists as one who pushes the dominant partner to inflict pain.[428] These were held by the trial judge to be inadmissible under the New York Rape Shield Statute.[429]

New York Criminal Procedure Law 60.42 provides that evidence of a victim's sexual conduct shall not be admissible in a prosecution for a sex offense.[430] The Rape Shield Law was drafted for the purpose of protecting those persons who are sexually active outside a legally sanctioned relationship.[431] It serves the important policy objective of removing certain impediments to the reporting of sex crimes.[432] Specifically, the law was drafted to encourage victims of sex offenses to prosecute their attackers, without fear that their own prior sexual activities, regardless of their nature, could be used against them at trial.[433] In enacting the Rape Shield Law, the legislature sought to prevent muddling the trial with matters relating to a victim's prior sexual conduct which have no proper bearing on the defendant's guilt or innocence, but only serve to impugn the character of the complainant and to prejudice the jury.[434] Nevertheless, the statute contains a number of exceptions. The court is permitted to admit evidence of the victim's sexual conduct when the evidence "tends to prove specific instances of the victim's prior sexual conduct with the accused."[435] This provision is justified because a "history of intimacies" would "tend to bolster a claim of consent."[436] Another exception provides for admissibility when needed to rebut prosecution evidence that "the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim."[437] The statute concludes with a flexible catch-all exception when the court finds that evidence of the victim's sexual conduct is "relevant and admissible in the interests of justice."[438]

In reversing the defendant's conviction, the appellate division laid out three major grounds for finding error in the exclusion of the complainant's

428. *Id.* at 189-91, 700 N.Y.S.2d at 163-64.
429. *Id.*
430. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2000).
431. *Jovanovic*, 263 A.D.2d at 205-06, 700 N.Y.S.2d 156, 174.
432. *Id.*
433. *Id.*
434. *Id.*
435. N.Y. CRIM. PROC. LAW § 60.42(1).
436. 263 A.D.2d at 195, 700 N.Y.S.2d at 167; *see also* M. Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 58 (1977).
437. N.Y. CRIM. PROC. LAW § 60.42(4).
438. N.Y. CRIM. PROC. LAW § 60.42(5).

e-mails. It held that (1) the Rape Shield Statute applies to evidence of the victim's sexual *conduct* but does not apply to victim *statements* about that conduct;[439] (2) even if the statute applied, the excluded evidence should have been admitted under one or more of three exceptions in the statute;[440] and (3) even if the statute applied and even if none of the exceptions permitted admissibility, the exclusion of complainant's e-mails was an unconstitutional denial of defendant's right of confrontation and of his right to testify in his own defense.[441]

The Court held first that the redacted e-mail messages were not subject to the Rape Shield Law because they did not constitute evidence of the sexual conduct of the complainant.[442] Rather, they were merely evidence of statements made by the complainant about herself to Jovanovic.[443] The First Department insisted that this distinction was not merely a semantic one. It argued:

> Direct evidence of a complainant's *conduct* with others would generally be introduced (if admissible) as a basis to infer that she had voluntarily behaved in such a way on prior occasions with others. In contrast, the use of a statement is not so straightforward. It is frequently relevant not to prove the truth of the matter stated, but rather, for the fact that the speaker made the statement. That is, a statement may be relevant as proof of the speaker's, or the listener's, state of mind.
>
> For instance, here, the complainant's statements to Jovanovic regarding sadomasochism were not necessarily offered to prove the truth of what she said, i.e. that she actually was a sadomasochist. Rather, much of their importance lay in the fact that she chose to say these things to Jovanovic in the context of her electronic, on-line conversation with him, so as to convey to him another message, namely, her interest in exploring the subject of such activities with him.[444]

This ground for reversal may be the most significant as well as the most controversial. No prior holding in New York has clearly drawn a clear line between prior sexual conduct and statements concerning prior sexual conduct.[445]

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439. *Jovanovic*, 263 A.D.2d at 192-94, 700 N.Y.S.2d at 165-66.
440. *Id.* at 195-200, 700 N.Y.S.2d at 167-70.
441. *Id.* at 199-02, 700 N.Y.S.2d at 170-71.
442. *Id.* at 192-94, 700 N.Y.S.2d at 165-66.
443. *Id.*
444. *Id.*, 263 A.D.2d at 194, 700 N.Y.S.2d at 166.
445. *Id. But see* People v. Hauver, 129 A.D.2d 889, 514 N.Y.S.2d 814 (3d Dep't 1987) (holding the Shield Law inapplicable to complainant's statement to defendant that she intended to have sex that night); *and* People v. Kellar, 174 A.D.2d 848, 571 N.Y.S.2d 144 (3d Dep't 1991) (drawing distinction between statements and conduct under CPL when

Next, the Court found that each one of three statutory exceptions would cover the redacted e-mails. Even if the statements are regarded as "sexual conduct," the exception for evidence of "the victim's past sexual conduct with the accused" should apply.[446] The exception is based on its relevance to show prior sexual activity with the accused in order to bolster the defense of consent.[447] "The statements here, especially in view of their intimate nature, have the same sort of potential of shedding light on the motive, intent and state of mind of these two people in their subsequent encounter."[448]

Moreover, the Court found that the e-mail reporting the complainant's involvement in violent sex with her boyfriend, Luke, was admissible under the exception for evidence tending to rebut the people's showing that the accused is the cause of "disease" of the victim.[449] At trial, the prosecution argued that defendant had caused various bruises on complainant. Therefore, the accused should have been able to inquire into complainant's relationship with Luke, particularly since she specifically stated in her e-mail that her conduct with him was "painful."[450] Here, the Court was forced to concede that the statutory exception does not include the word "injury."[451] However, it would be illogical, the majority opinion tells us, to "permit one defendant to introduce evidence rebutting a showing that he was the cause of disease in the victim, but not permit another defendant to rebut a showing that he was the cause of the victim's injuries. No rational distinction can be made."[452] The Court also found that "interest of justice" exception covered the redacted statements.[453] It reasoned:

> Even if no other exception applied, the precluded communications from the complainant to Jovanovic were highly relevant. The defense did not seek to introduce them to demonstrate the complainant's "unchastity" and thereby impugn her character or her honesty. Instead, the fact that the complainant made these statements to Jovanovic is relevant to establish that she purposefully conveyed to Jovanovic an interest in engaging in consensual sadomasochism with him.[454]

Finally, the First Department majority elevated the evidentiary issue

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60.42(3) permits evidence that complainant had engaged in sexual conduct with others).

446. *Jovanovic*, 263 A.D.2d at 195-98, 700 N.Y.S.2d at 167.
447. *Id.*
448. *Id.*
449. *Id.* at 195-97, 700 N.Y.S.2d at 167-68.
450. *Id.*
451. *Id.* at 196-98, 700 N.Y.S.2d at 168.
452. *Id.*
453. *Id.* at 196-98, 700 N.Y.S.2d at 168.
454. *Id.*

to a constitutional level. It held that the redaction of the complainant's statements to Jovanovic, and its consequent limitation on the defense's cross-examination of the complainant regarding her interest and participation in sadomasochism and her relationship with Luke, resulted in a violation of defendant's Sixth Amendment right to confront the People's primary witness against him.[455] The Court noted that the People were able to portray Jovanovic "as a monstrous sadist, scanning the Internet for unwary victims, preying on unknowing, naive, innocents."[456] The complainant was pictured at trial as naive, overly trusting, ill-informed and as someone who, as she testified, doesn't "understand violence."[457] Defendant was denied the evidence to show that this was an unbalanced portrayal. Moreover, the opinion concluded that the trial court's ruling "gutted Jovanovic's right to testify fully in his own defense, since it prohibited him from offering the jury any evidence justifying an asserted belief that the complainant had indicated a desire to participate in sadomasochism with him."[458]

The sweeping nature of this decision and the limitations it has imposed on the Rape Shield Statute are likely to draw comment. Indeed, the dissenting justice characterized the majority's construction of the statute as serving "to turn the clock back to the days when the main defense to any such charge was to malign the complainant."[459]

CONCLUSION

Looking ahead to the next year, there are a number of developments to watch. If given the opportunity on an appeal of *People v. Jovanovic*,[460] what will the New York Court of Appeals say about the First Department's persuasive but limited construction of the Rape Shield Statute? Of more importance to civil practitioners is the state of New York law on expert testimony. To what extent will it be influenced and shaped by the federal trilogy of *Daubert*, *Joiner* and *Kumho*?[461] On the federal side, important

455. *Id.* at 199-202, 700 N.Y.S.2d at 170-71.

456. *Id.* at 199-201, 700 N.Y.S.2d at 170.

457. *Id.* at 199-202, 700 N.Y.S.2d at 170-72.

458. *Id.* at 201-02, 700 N.Y.S.2d at 171.

459. *Id.* at 205, 700 N.Y.S.2d at 174. The dissenting justice agreed that some of the erroneous evidence rulings of the trial court required reversal of the kidnapping and sexual abuse convictions. *Id.* at 205-06, 700 N.Y.S.2d at 175. However, he would have affirmed the convictions for assault and would have construed the Rape Shield Statute to prohibit any statements relating to complainant's sexual conduct with another. *Id.* at 204-06, 700 N.Y.S.2d at 173-74.

460. 263 A.D.2d 182, 700 N.Y.S.2d 156 (1st Dep't 1999).

461. *Kumho Tire*, 526 U.S. 137, *Joiner*, 522 U.S. 136; *Daubert*, 509 U.S. 579; *see*

proposed amendments to Federal Rules of Evidence 702 and 703 regarding expert testimony are scheduled to become effective in December 2000.[462] Their effect in federal courts and their possible impact on New York judges will be subjects for future *Surveys*.

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supra text accompanying notes 191-219.

462. *See supra* text accompanying notes 205-07 (explaining the amendment to Rule 702). An amendment to Rule 703 has also been proposed to restrict the admissibility of facts underlying an expert opinion when those facts would not otherwise be admissible in evidence. Committee Note to Proposed Amendment to FED. R. EVID. 703. As it now reads, Federal Rule of Evidence 703 allows an expert to base an opinion upon facts or data that are not admissible if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." FED. R. EVID. 703. The proposed amendment goes on to say, however, that "[F]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Committee Note to Proposed amendment to FED. R. EVID. 703. This provision reverses the usual balancing test contained in Federal Rule of Evidence 403. "The amendment provides a presumption against disclosure to the jury of information used as a basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert." Committee Note to Proposed Amendment to FED. R. EVID. 703.